Volume 53 | Issue 1 Article 4

2008

The Geography of Justice Wormholes: Dilemmas from Property and Criminal Law

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THE GEOGRAPHY OF JUSTICE WORMHOLES: DILEMMAS FROM PROPERTY AND CRIMINAL LAW

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Falling into a black hole has become one of the horrors of science fiction. In fact, black holes can now be said to be really matters of science fact.

Of course, where the science fiction writers really go to town is on what happens if you do fall into a black hole. A common suggestion is that if the black hole is rotating, you can fall through a little hole in space-time [(a wormhole)] and out into another region of the universe . . .

I'm sorry to disappoint prospective galactic tourists, but this scenario doesn't work: if you jump into a black hole, you will get torn apart and crushed out of existence. However, there is a sense in which the particles that make up your body do carry on into another universe. I don't know if it would be much consolation to someone being made into spaghetti in a black hole to know that his particles might survive.

-Stephen Hawking[1]

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1. STEPHEN HAWKING'S A BRIEF HISTORY OF TIME: A READER'S COMPANION 86 (Stephen Hawking ed., Gene Stone prep., 1992).

I. INTRODUCTION: THE PROBLEM OF JUSTICE WORMHOLES

THIS Article explores justice wormholes,[2] which like the rotating black holes that Hawking describes, threaten to tear apart and crush their inhabitants as they transport them to another dimension. These wormholes are governmentally-constructed links between legal spaces devoid of the supposedly familiar guarantees of procedural or substantive protection. They confirm that "legal justice"[3] is a concept that depends on the proper interrelationship of "place," "space" and "time."[4] If one is unlucky enough to be in the wrong place, at the wrong time, under the wrong legal construct, one is in danger of "being made into spaghetti."[5]

Property and criminal law provide particularly rich areas in which to consider this wormhole problem. Both areas of law are ones in which sovereign power is especially strong. All legally-protected property rights in the United States originate from the federal sovereign, which obtained those rights through conquest.[6] Criminal law helps to maintain the order necessary to the functioning of a democratic society, and its promulgation and enforcement is generally recognized as a core competency of government.[7] Although U.S. property and criminal law generally attempt to balance the sovereign against private rights in a way consistent with

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2. Wormholes are "tunnels that link distant parts of space and time." MICHIO KAKU, HYPERSPACE: A SCIENTIFIC ODYSSEY THROUGH PARALLEL UNIVERSES, TIME WARPS, AND THE TENTH DIMENSION, at x (1994). This Article uses the term "wormhole" rather than "black hole" to connote not only crushing force, but also transportation to a different spatio-temporal configuration.

3. "Justice" is a term with contested meanings expressed through an extensive scholarly literature in multiple disciplines. This Article uses the term "justice" broadly, encompassing both substantive and procedural aspects, in a sense that harkens back to the Justinian notion of a legal system dedicated to continually giving people what they deserve. *See* J. INST. 1.1 (533) ("*Iustitia est constans et perpetua voluntas ius suum cuique tribuens. Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia.*"). For examples of some recent works exploring intertwined concepts of social and legal justice, see AJIT ATRI, GANDHI'S VIEW OF LEGAL JUSTICE (2007); IMAGINARY BOUNDARIES OF JUSTICE: SOCIAL AND LEGAL JUSTICE ACROSS DISCIPLINES (Ronnie Lippens ed., 2004).

4. The meaning of these terms is explored in more detail in the introduction to Part II. *See infra* notes 23-27 and accompanying text. These terms are used in a range of contexts in the geography literature. For two very different analyses engaging the spaces of the international economy, compare Alexander B. Murphy, *The Sovereign State System as Political-Territorial Ideal: Historical and Contemporary Considerations, in* STATE SOVEREIGNTY AS SOCIAL CONTRACT 81, 107 (Thomas J. Biersteker & Cynthia Weber eds., 1996), with DAVID HARVEY, SPACES OF CAPITAL: TOWARDS A CRITICAL GEOGRAPHY 369 (2001).

5. HAWKING, *supra* note 1, at 86.

6. For an interesting analysis of property and sovereignty, see Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Towards a Cultural Geography of Ownership*, 48 STAN. L. REV. 1293 (1996).

7. *Cf.* Saudi Arabia v. Nelson, 507 U.S. 349, 361 (1993) (describing police power as "peculiarly sovereign" in nature).

democratic principles, both contain lacunae in which categories of people face systems of radically unequal justice.[8]

More specifically, this Article focuses on the comparative geography of two contexts in which wormholes have flourished: the federal government's relationship with indigenous peoples and its treatment of "War on Terror" detainees. In the first case example, two international tribunals have attempted to intervene in the U.S. government's treatment of Mary and Carrie Dann, Western Shoshone grandmothers who have had their traditional land expropriated—outside of the system generally governing takings because of the Indian Law context—and then been sued in trespass for using it.[9] The second example focuses on the recently-convicted José Padilla's oscillating status as a criminal defendant or an "enemy combatant," including ever-shifting charges and procedural barriers to challenging his designation.[10] These wormholes contain complex, multiscalar geographies in which the possibilities for substantive or procedural justice[11] depend upon interactions among branches and levels of government, as well as nongovernmental actors.[12] Both reflect a long history of differential treatment of categories of people designated as "other,"[13]

8. For a narrative of this due process dynamic from multiple perspectives, see Stephanie Weinstein & Arthur Wolfson, *Toward a Due Process of Narrative: Before You Lock My Love Away, Please Let Me Testify*, 11 ROGER WILLIAMS U. L. REV. 511 (2006).

9. For an analysis of the *Dann* case, see *infra* notes 28-105 and accompanying text.

10. For an analysis of the *Padilla* case, see *infra* notes 106-63 and accompanying text.

11. The concept of due process has been contested in the scholarly literature. For example, Susan Klein explains:

> I fully agree that both history and text support the idea that due process has independent life in both the criminal and civil contexts apart from the particular provisions in the Bill of Rights . . . . The line between substantive and procedural due process is not clearly drawn. The Court has identified certain legislative and executive action that simply cannot be countenanced regardless of the procedures used. . . . Regardless of the intent of the framer's [sic] of the Bill of Rights and drafters and ratifiers of the Fourteenth Amendment, the Court has utilized the fundamental fairness doctrine since reconstruction, and is unlikely to stop now.

Susan R. Klein, Miranda*'s Exceptions in a Post-*Dickerson *World*, 91 J. CRIM. L. & CRIMINOLOGY 567, 573-74, 573 n.34 (2001). Although this Article acknowledges the substantive and procedural aspects of these cases and the blurriness between them, a full exploration of due process is beyond the scope of its analysis.

12. I have explored a similar map of relationships in the context of climate change litigation. *See* Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH U. L.Q. 1789 (2005). Numerous scholars working at the intersection of international law and other disciplines have advanced theories to describe this phenomenon in the context of litigation. For example, Anne-Marie Slaughter has analyzed the increasing interconnection among courts around the world. *See* Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

13. For a comparison between historical treatment of immigrants and the War on Terror, see Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizenship*, 103 MICH. L. REV. 1595 (2005) (book review).

but in current variations that reflect the post-9-11 War on Terror and processes of globalization.[14]

These examples and their legal context are emblematic of a broader phenomenon that persists across many areas of the law. A well-traveled terrain in judicial opinions and scholarly literature explores the appropriateness of constructing categories that force people outside of the "normal" protections and the minimum requirements that justice and the law require in such circumstances.[15] An in-depth analysis of these two representative geographies, however, reveals more specific concerns about the slipperiness of these legal spaces and provides the basis for engaging normative questions about the boundaries of justice in the current environment. The Dann sisters and Padilla—all U.S. citizens—move inside and outside of legal spaces over the course of their cases such that their possibilities for relief seem to hinge more upon how they are classified and what tribunal they happen to be before at a particular moment than any consistent principle of justice. Moreover, "enemy" status haunts them throughout their ordeal, with Mary and Carrie Dann facing the legal structures resulting from this country's conquest of its indigenous inhabitants and with José Padilla navigating the maze created by our more recent War on Terror.

The intersecting vectors of place, space and time—themselves ambiguous concepts which are explored in depth in Part II[16]—running through these cases raise foundational questions about the way in which socio-legal constructions of national power create and maintain justice wormholes. The nation-state dominates both stories. Through dynamics among its three branches, the federal government repeatedly reconstructs the justice problems represented in these two cases and resists efforts at outside intervention. And yet powerful advocacy inside and outside of those formal constructions takes place in both cases. How should we view the nation-state in these narratives? Is it an enclosed space in which these controversies take place, or are its boundaries more porous? What is the best way to characterize the web of formal and informal relationships that run through the nation-state and interact with it? Does our conception of the nation-state impact the possibilities for deconstructing justice wormholes?

14. *See infra* notes 23-163 and accompanying text.

15. The literature on this issue specific to the *Dann* and *Padilla* cases is reviewed *infra* notes 23-163 and accompanying text. For a discussion of the confluence of the War on Terror and indigenous rights, see Robert Odawi Porter, *Tribal Disobedience*, 11 TEX. J. C.L. & C.R. 137 (2006). For an exploration of civil liberties in the context of the War on Terror, see Bruce Ackerman, *Terrorism and the Constitutional Order*, 75 FORDHAM L. REV. 475 (2006); Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365 (2007); Symposium, *War, Terrorism, and Torture: Limits on Presidential Power in the 21st Century*, 81 IND. L.J. 1139 (2006).

16. These terms have a variety of different meanings, as discussed in depth in Part II, *infra* notes 23-163 and accompanying text. I use them in their most physical sense, as well as more conceptually, throughout this Article.

After exploring three possible models of the nation-state, Part III argues that an enmeshed model of the United States, grounded in network theory and legal pluralism,[17] provides a fuller set of options for addressing the justice failures exemplified in the two cases. An analysis that views the U.S. federal government as constituted by and in constant engagement with a myriad of actors at multiple scales allows for a deeper understanding of its formal and informal legal choices. Through such an approach, possibilities for justice exist even when formal legal structures constituting the wormholes are intractable. The Danns have yet to receive permission to continue their traditional way of life on their land, but public pressure helps to constrain the behavior of the federal government and corporate entities on Western Shoshone land. Although the formal legal system never reviewed the appropriateness of Padilla's designation, the protests over his treatment likely played a role in his return to the criminal justice system.

These dilemmas about how we should regard the United States in the narrative of these cases leads back to the normative difficulty with which the Article begins: What are and should be the boundaries of the exceptionalism, both intra-nation-state and inter-nation-state, that runs through these cases? The historical and ongoing lessons regarding governmental treatment of those labeled as threatening—for example, Fred Korematsu's conviction during the World War II Japanese internment was not vacated until 1984[18]—indicate that the spaces for justice at times fail to balance adequately or consistently the values of liberty and security.

The Article concludes that such a balance would require greater integration of these exceptional spaces—reached through "justice wormholes"—into the way in which our legal system generally approaches the issues involved. For example, as the Inter-American Commission on Human Rights details, the procedure for expropriation applied to the Danns would not have passed muster under U.S. takings jurisprudence.[19] In the current post-*Kelo*[20] environment, the question of what "public use" entails is hotly contested.[21] But because of the Indian Claims Commission

17. *See infra* notes 162-223 and accompanying text.

18. *See* Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) ("[*Korematsu*] . . . stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability.").

19. *See* Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 113/01 ¶ 144 (2001), *available at* http://www.cldh.org/annualrep/2002eng/usa.11140.html.

20. *See* Kelo v. City of New London, 545 U.S. 469, 476 (2005) (holding that "public use" is not violated when land is transferred from one private owner to another as part of an urban redevelopment plan).

21. For examples of the discourse over the implications of *Kelo*, see Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J. L. & PUB. POL'Y 491 (2006); Daniel H. Cole, *Why* Kelo *Is Not Good News for Local Planners and Developers*, 22 GEORGIA STATE L. REV. 803 (2006); Ilya Somin, *Controlling the Grasping Hand: Economic Development*

context in which the *Dann* case occurred, these issues never meaningfully arose. Instead, according to the Inter-American Commission petitioners—advocating on behalf of the Danns—"the United States argued that Western Shoshone aboriginal and treaty rights to land had been lawfully extinguished by gradual encroachment."[22] Under such a theory, the U.S. government was able to establish the transfer of ownership of large swaths of land with little regard for whether the land was physically taken or any public purpose was actually involved.

Addressing wormholes and exceptional spaces should at the very least include: (1) clearer minimum protections for fundamental liberties; (2) greater core consistency in legal structures and judicial application of them; (3) increased protection of those at risk of being categorized as other; and (4) more complete mapping of situations that takes into account multiple narratives. Geography's focus on spatio-temporal context and exploration of the nuances of scale allows for a deeper understanding of how basic protections of justice have been eliminated in these cases and what reconstructing them would entail. Geographic analysis cannot force the U.S. federal government to treat the Danns or Padilla differently, but its approach may help in efforts to reshape these spaces so that they contain a justice floor rather than a wormhole.

This Article's law and geography approach to these justice wormholes thus serves two overlapping purposes. It enables a thicker description of how these problems are constructed and possible ways of viewing them. This descriptive analysis in turn raises normative questions about how cases like the Dann and Padilla ones should be handled. The Article argues that this dynamic process of interrogation and reconstruction will help to provide the conceptual grounding for fairer legal categorization in the future.

II. Tales of Two Wormholes

This Part describes the Dann and Padilla cases using the vectors of place, space and time. Before moving into this analysis, however, some clarification of these terms is in order. The relationship among place, space and time has long been contested across disciplines through ongoing debates over scientific naturalism and modernism/post-modernism.[23]

Takings After Kelo, Sup. Ct. Econ. Rev. (forthcoming) (draft on file with author); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo (forthcoming) (draft on file with author); Amanda W. Goodwin, Note, *Rejecting the Return to Blight in Post-*Kelo *State Legislation*, 82 N.Y.U. L. Rev. 177 (2007).

22. *See Dann*, Case 11.140 ¶ 47.

23. For analyses of modernism and postmodernism in the context of law, see Stephen M. Feldman, American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage 13 (2000); Gary Minda, Postmodern Legal Movements: Law and Jurisprudence at Century's End (1995). For analyses of modernism and postmodernism in geography, see David Harvey, The Condition of Postmodernity: An Enquiry Into the Origins of Cultural Change (1989); Edward W. Soja, Postmodern Geographies: The Reassertion of Space in

As a starting matter, definitional problems abound. Is "place" simply a physical location or is it a social construct?[24] Should "space" be viewed as the matrix in which places are located, or be used to describe legal, economic, political and social structures?[25] How can our general perception of time's Newtonian forward march be reconciled with Einstein's more complex vision?[26]

The definitional questions only become more difficult when these ideas are tied together in a socio-legal context. As geographers Eric Sheppard and Robert McMaster explain:

> Theoretically, more and more human geographers have come to question the adequacy of Euclidean coordinate systems as a way of representing space and time. They are not concerned with the fact that the earth's surface is more accurately represented by spherical than Cartesian coordinates, but with the question of what distance means in the social realm. Human geographers agree that the actual distance between two places may have little to do with the miles separating them. Black and white neighborhoods may be only across the street from one another. Yet the effective social distance separating them, as indicated by minimal social interaction between them, can be enormous. Similarly, although New York and London are far apart in Euclidean space, in other senses, as measured by flows of money, people, and information, they are much closer to one another than either is to other cities a few miles away.[27]

Understanding dynamics among place, space and time thus requires an engagement of both material and conceptual aspects of them. Namely, these cases are adjudicated and have facts tied to specific physical places at

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CRITICAL SOCIAL THEORY (1989). For an analysis of scientific naturalism, see EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE (1973).

24. *See* John A. Agnew & James S. Duncan, *Introduction* to THE POWER OF PLACE: BRINGING TOGETHER GEOGRAPHICAL AND SOCIOLOGICAL IMAGINATIONS 1, 1 (John A. Agnew & James S. Duncan eds., 1989).

25. *See* DOREEN MASSEY, FOR SPACE 62-99 (2005); YI-FU TUAN, SPACE AND PLACE: THE PERSPECTIVE OF EXPERIENCE 6 (1977); Helen Couclelis, *Location, Place, Region, and Space, in* GEOGRAPHY'S INNER WORLDS: PERVASIVE THEMES IN CONTEMPORARY AMERICAN GEOGRAPHY 215, 215 (Ronald F. Abler et al. eds., 1992); Michael R. Curry, *On Space and Spatial Practice in Contemporary Geography, in* CONCEPTS IN HUMAN GEOGRAPHY 3-32 (Carville Earle et al. eds., 1996).

26. For analyses of the transition from valorizing time to exploring the importance of space, see MICHEL FOUCAULT, *Questions on Geography, in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977, 63-77 (Colin Gordon ed., 1980); SOJA, *supra* note 23, at 3-4, 31-35; Michel Foucault, *Of Other Spaces*, 16 DIACRITICS 22 (Jay Miskowiec trans., 1986).

27. Robert B. McMaster & Eric Sheppard, *Introduction: Scale and Geographic Inquiry, in* SCALE AND GEOGRAPHIC INQUIRY: NATURE, SOCIETY AND METHOD 1, 15 (Eric Sheppard & Robert B. McMaster eds., 2004).

particular points in time, but occur in a broader context that helps to determine how that map matters.

In recognition of that duality, the following case analyses attempt to provide a holistic engagement of how these vectors intersect. They treat place as a physical location, but also as a cultural construct. Space references institutional and legal structures, and the possibilities for informal interaction that can occur within them. Time includes concrete tactics—delay, procedural filing barriers, strategic release of information—but also the histories that undergird the current wormholes in our justice system. Moreover, as with the concepts themselves, problems of place, space and time bleed into one another. The accounts of this Part attempt to illustrate that blurriness and intertwinement while analyzing each aspect of these cases' geography.

A. *The Dann Sisters Trespass on Their Own Land*

This Section explores the geography of a convoluted series of legal conflicts through which, even with the intervention of two international tribunals, the United States views the Danns as trespassing on Western Shoshone ancestral land that their family has been using since the 1920s.[28] For clarity, Appendix I provides a chronology of the intertwined legal proceedings.

Beginning in the mid-1970s, Mary and Carrie Dann have fought a legal battle—which has outlived Mary Dann—to save the ancestral land that their family has long used. Their father started herding livestock on open range located on Western Shoshone land in Crescent Valley, Nevada in the 1920s.[29] The Dann sisters themselves began herding there in the

28. For scholarly analysis of this case, see Derek de Bakker, Note, *The Court of Last Resort: American Indians in the Inter-American Human Rights System*, 11 CARDOZO J. INT'L & COMP. L. 939 (2004); Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. REV. 637 (1999); John D. O'Connell, *Constructive Conquest in the Courts: A Legal History of the Western Shoshone Lands Struggle—1861 to 1991*, 42 NAT. RESOURCES J. 765, 787-92 (2002); Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, 6 HUM. RTS. L. REV. 281 (2006); John W. Ragsdale, Jr., *Individual Aboriginal Rights*, 9 MICH. J. RACE & L. 323 (2004); Deborah Schaaf & Julie Fishel, Mary and Carrie Dann v. United States *at the Inter-American Commission on Human Rights: Victory for Indian Land Rights and the Environment*, 16 TUL. ENVTL. L.J. 175 (2002); *see also* S. James Anaya, *Indian Givers: What Indigenous Peoples Have Contributed to International Human Rights Law*, 22 WASH. U. J.L. & POL'Y 107 (2006); S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33 (2001); Lorie M. Graham, *Resolving Indigenous Claims to Self-Determination*, 10 ILSA J. INT'L & COMP. L. 385 (2004); Austen L. Parrish, *Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights*, AM. INDIAN L. REV. (forthcoming) (draft manuscript on file with author).

29. *See* United States v. Dann, 873 F.2d 1189, 1193 (9th Cir. 1987).

1940s.[30] Although the United States expropriated significant portions of Western Shoshone land over the course of the 1800s by granting patents to settlers moving West, the Dann sisters contend that their land was never physically taken through this process.[31]

Rather, the Dann sisters' difficulties began in 1951 when representatives from the Te-Moak Tribe,[32] who the U.S. federal government recognized as qualified to represent the Western Shoshone, made a claim for damages to the Indian Claims Commission ("ICC") for the expropriation of tribal lands.[33] The Danns protested the inclusion of their land at the time, but did not formally intervene in the proceedings themselves until 1974, after the ICC's determination of title extinction and valuation.[34] The ICC ruled the Danns' intervention untimely, and then proceeded to finalize the compensation award over this land without evidence that the Danns' property, in particular, had been taken.[35] Multiple determinations by U.S. federal courts, including the U.S. Supreme Court, resulted in the U.S. Bureau of Land Management having the right to cite the Danns in 1974 for trespassing and in the federal government seizing their cattle on numerous occasions.[36]

Despite the intervention of the Inter-American Commission on Human Rights, the Bureau proceeded in the 1990s to impound much of the Dann sisters' livestock.[37] The Inter-American Commission ruled in 2002 that the process by which the United States expropriated the Danns' land had failed to ensure their "right to property under conditions of equality."[38] The U.S. government rejected the Inter-American Commission's decision,[39] and allegedly has attempted to privatize Western Sho-

30. *See id.* For a map showing the location of Crescent Valley, see Eureka County Vicinity Map, http://www.co.eureka.nv.us/graphic/map01.jpg. For a map indicating the locations of Native American reservations and colonies in Nevada, see Nevada Department of Transportation, Indian Reservations and Colonies in Nevada (2007), *available at* http://www.nevadadot.com/traveler/maps/State Maps/pdfs/ReservationColonies.pdf.

31. Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 113/01, ¶ 39 (2001), *available at* http://www.cldh.org/annualrep/2002eng/usa.11140.html.

32. The name of this tribe is used inconsistently in the case documents. I use "Te-Moak Tribe" in the text because this is name the tribe uses in its materials. *See* Te-Moak Tribe of the Western Shoshone Indians of Nevada, http://www.temoaktribe.com (last visited Oct. 27, 2007).

33. *See Dann,* Case 11.140, ¶ 89.

34. *See* United States v. Dann, 572 F.2d 222, 225 (9th Cir. 1978).

35. *See id.* at 223, 225.

36. *See id.* at 223.

37. *Dann,* Case 11.140, ¶ 2, 42.

38. *See id.* ¶ 172.

39. *See* Response of the Government of the United States to October 10, 2002 Report No. 53/02 Case No. 11.140 (Mary and Carrie Dann), *available at* http://www.cidh.org/Respuestas/USA.11140.htm; Observations of the Government of the United States to the Inter-American Commission on Human Rights Report No. 113/01 of October 15, 2001 concerning Case No. 11.140 (Mary and Carrie Dann)

shone ancestral lands to allow for multinational extractive and energy activities, has planned destructive activities at spiritually or culturally significant sites and has resumed underground nuclear testing.[40]

In response to these claims, the United Nations Committee for the Elimination of Racial Discrimination in 2006 urged the United States to take a variety of interim measures to avoid continuing the expropriation and transfer to private energy and extractive interests "until a final decision or settlement is reached on the status, use and occupation of Western Shoshone ancestral lands in accordance with due process of law and the State party's obligations under the Convention" on the Elimination of Racial Discrimination.[41] In its April 2007 periodic report to the Committee, the United States "maintain[ed] its position that the issues raised by certain Western Shoshone descendents are not appropriate for consideration under early-warning measures and urgent procedures . . . ."[42] The Committee responded in its February 2008 concluding observations: "While noting the explanations provided by the State party with regard to the situation of the Western Shoshone indigenous peoples," "the Committee strongly regrets that the State Party has not followed up on the recommendations."[43]

1. *Place*

Ties to place are at the core of the dispute in the *Dann* case. They recur throughout the multiple narratives of the seemingly endless court cases over this stretch of arid grazing land in Nevada. The most straightforward account of place is one steeped in materiality;[44] the fight is over land that belonged to the Western Shoshone, that was subject to treaties between tribes and the U.S. government, that the U.S. federal government

(Dec. 17, 2002), *available at* http://www.state.gov/s/l/38647.htm ("The United States rejects the Commission's Report No. 113/01 of October 15, 2001, in its entirety. The United States respectfully requests that the Commission publish the following Response of the United States in the next Annual Report of the Commission, if Report No. 113/01 is published.") [hereinafter Observations].

40. *See* Committee for the Elimination of Racial Discrimination [CERD], Res. 68/1, ¶ 7, U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006), *available at* http://www.universalhumanrightsindex.org/documents/824/1127/document/en/pdf/text.pdf.

41. *See id.* ¶ 10.

42. *See* Periodic Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination, April 2007, ¶ 342, *available at* http://www.state.gov/documents/organization/83517.pdf.

43. *See* Committee for the Elimination of Racial Discrimination [CERD], Consideration of Reports Submitted by State Parties under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, ¶ 19, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008) (on file with author) [hereinafter CERD Concluding Observations].

44. For a discussion of the deep ties that indigenous peoples' have to particular physical places, see S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 104–07 (2d ed. 2000).

claims to have expropriated, and that Mary and Carrie Dann and their family have had as a home and the center of their livelihood.

From the beginning of the lawsuits, multiple parties have laid claim to this physical place. At the Indian Claims Commission, tribal representatives sued the U.S. government for expropriating it and the Danns sought to intervene late in that process to say that a portion of that land had not been taken away.[45] When the tribal representatives subsequently changed their position, this federally constituted tribunal tied to the U.S. governmental seat of power in Washington, D.C. deemed that reversal to be too late.[46] The trespass case against the Danns moved up and down the federal courts as the Indian Claims Commission finalized the expropriation and compensation.[47]

The Danns' experience in the U.S. legal system was both Kafkaesque[48] and Sisyphean.[49] They encountered a changed world in which the fact that no one else was using their land did not seem to matter. In response, they repeatedly rolled legal boulders uphill only to have courts knock them back down. Throughout this process, the slim possibility of relief hinged upon whether they had the formal right to represent the status of this land despite the constraints of the act establishing the Indian Claims Commission and of their late intervention[50]—an effort that they made before each tribunal that heard their claim. As Carrie Dann expressed in a 2003 speech, "[o]ur land is not for sale. The United States thinks it can do whatever it wants, but we know and our children and grandchildren will know that we never sold our land."[51] Only the Ninth

45. *See* W. Shoshone Identifiable Group v. United States, 35 Ind. Cl. Comm. 457, 460 (1975).

46. *See* Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 113/01, ¶ 118 (2001), *available at* http://www.cldh.org/annualrep/2002eng/usa.11140.html.

47. For the federal court proceedings in the Ninth Circuit Court of Appeals and the U.S. Supreme Court, see United States v. Dann, 470 U.S. 39 (1985); 873 F.2d 1189 (9th Cir. 1989); 706 F.2d 919 (9th Cir. 1983); 572 F.2d 222 (9th Cir. 1978).

48. *The Metamorphosis* begins: "When Gregor Samsa woke up one morning from unsettling dreams, he found himself changed in his bed into a monstrous vermin." FRANZ KAFKA, THE METAMORPHOSIS 3 (Stanley Corngold ed., trans., Bantam reissue ed. 2004). The Danns woke up to discover that their land, despite no one else using it, had been taken before they were born.

49. In the Greek myth, the gods punished Sisyphus by making him endlessly roll a boulder uphill; as Sisyphus approached the top of the mountain, the boulder would escape from him and roll back down to the bottom. Camus used this myth, as well as the work of Kafka, to expound upon the absurdity of modern life. *See* ALBERT CAMUS, THE MYTH OF SISYPHUS AND OTHER ESSAYS (Justin O'Brien trans., Vintage International 1991).

50. *See supra* notes 33–34 and accompanying text.

51. *See* Indian Law Resource Center Website, http://www.indianlaw.org/main/projects/icm/wsdc (quoting Nov. 7, 2003 speech).

Circuit Court of Appeals—overridden by the U.S. Supreme Court[52]—and the Inter-American Commission[53] treated the land as potentially theirs on the basis of their Western Shoshone identity.[54]

The U.S. government, even after the Inter-American Commission decision, articulated an alternative perspective on who had the right to speak for the land. Its observations in response to the Inter-American Commission stated:

> The lands involved in this case are part of a much larger area that was at issue in an action resolved by the Indian Claims Commission in 1977 . . . . The fundamental error evidenced throughout the Commission decision is its factual assumption that the land claim at issue in the Indian Claims Commission litigation represented an aggregation of individual claims and not a collective tribal claim of the Western Shoshone.[55]

The U.S. federal government recognized the tribal leaders—and not the Danns—as the appropriate voice for the land at the point in time at which the disputes were occurring; moreover, it expressed its own territorial authority, through all three branches of government and the special institutions created to address Native American land claims, to make that decision, as well as the decision about whether it had effectively and legally expropriated the land.

These conflicting narratives of the material space that this place occupies open larger questions about whose perspective matters and what narrative should be enshrined in law. The Danns' claim can be viewed as stretching back to the pre-colonial spaces that the U.S. government altered through highly problematic means.[56] Multiple colonial narratives attempt to justify this transformation of legal space while still laying claim to democratic and civil libertarian values.[57] The question of whether tri-

52. *See* United State v. Dann, 470 U.S. 39, 51 (1985) (reversing Ninth Circuit's holding).

53. *See* Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 113/01 (2001), *available at* http://www.cldh.org/annualrep/2002eng/usa.11140.html.

54. *See* United States v. Dann, 572 F.2d 222, 225-27 (9th Cir. 1978). Complex questions about the relationships among members of tribes, tribal decision-makers and federal courts continue. For example, the First Circuit recently held that individual tribal members had standing to challenge a decision by a tribal government in federal court. *See* Nulankeyutmonen Nkihtaqmikon v. Impson, No. 06-2733, 2007 WL 2685200 (1st Cir. Sept. 14, 2007).

55. *See* Observations, *supra* note 39, at Part I and Section II.A.

56. As noted by the Inter-American Commission, "the parties agree that at some point the Western Shoshone had title to this territory as their ancestral lands." *Dann*, Case 11.140, ¶ 100.

57. For an analysis of these narratives, see Sherene H. Razack, *When Place Becomes Race, in* RACE, SPACE, AND THE LAW: UNMAPPING A WHITE SETTLER SOCIETY 1-20 (Sherene H. Razack ed., 2002). For analyses of the complexities of reconciling liberalism and republicanism with Indian Law, see Bethany R. Berger, *Liberalism and Republicanism in Federal Indian Law*, 38 CONN. L. REV. 813 (2006); Erin Ruble & Gerald Torres, *"Perfect Good Faith,"* 5 NEV. L.J. 93 (2004).

bal leaders should be speaking for the Danns' land could be viewed as simply an intra-tribal dispute, as the U.S. account conveys, or as a vestige and continuation of the colonial dismantling and reconstituting of Native American's sociopolitical and legal spaces in which the U.S. federal government—through its statutes and judicial decisions—determines appropriate tribal representation. The right of U.S. federal courts to resolve the dispute hinges on its claim to this place as part of the overall U.S. territory, with Native sovereignty—despite its legally recognized separateness—buried within nation-state sovereignty.

Moreover, these very issues of perspective are controversial in part because non-Native American voices continue to dominate the story of the United States enshrined in history books.[58] Even efforts to provide indigenous peoples' perspectives in such accounts often frame the narrative in a fashion in which meaningful inclusion remains elusive.[59] In both law schools and the legal academy, Native Americans, as well as many other communities of color, often experience marginalization through the structuring of multiple, relevant spaces.[60] Although an in-depth engagement of these disputes is beyond the scope of this paper,[61] they provide a backdrop against which the material account of place in the Danns' case should be understood. An analysis of place in the Danns' case thus bleeds into issues of the spaces framing their dispute.

2. *Space*

The dominant narrative described above often becomes embodied in socio-political and legal structures.[62] Those structures in turn limit the possibilities open to indigenous peoples whose land has been taken.[63] The Danns are trapped inside a legal system in which the expropriator evaluates and validates its own expropriation with minimal responsiveness to external condemnation of its behavior. This section engages those constraints by considering the spaces represented in the legal options available to the Danns.

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58. *See* Razack, *supra* note 57, at 1-20.

59. *See* Carol Schick, *Keeping the Ivory Tower White: Discourses of Racial Domination, in* RACE, SPACE, AND THE LAW: UNMAPPING A WHITE SETTLER SOCIETY 99, 101 (Sherene H. Razack ed., 2002); *see also* Sheila Dawn Gill, *The Unspeakability of Racism: Mapping Law's Complicity in Manitoba's Racialized Spaces, in* RACE, SPACE, AND THE LAW: UNMAPPING A WHITE SETTLER SOCIETY 157, 162 (Sherene H. Razack ed., 2002).

60. *See Gill, supra* note 59, at 162.

61. For an interesting discussion of how Native American legal determinations should interact with liberal notions of good governance, see Angela R. Riley, *Good (Native) Governance,* 107 COLUM. L. REV. 1049 (2007).

62. *See* Richard Thompson Ford, *The Boundaries of Race: Political Geographies in Legal Analysis,* 107 HARV. L. REV. 1841, 1861 (1994); Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation,* 49 STAN. L. REV. 1365, 1366 (1997); Razack, *supra* note 57, at 1.

63. *See* Razack, *supra* note 57, at 3, 5.

Although the judicial dispute began in the Indian Claims Commission, this was not the beginning of the conflict over this land. The disposition of the land at the commencement of the legal proceedings was determined through a series of treaties negotiated between the United States and the Shoshone people in the mid-1800s.[64] These treaties, like so many others between the United States and Native Americans, reflect the unequal bargaining power that existed at that time.[65] More specifically, the Treaty of Ruby Valley, signed in 1863, defined the boundaries of Western Shoshone land.[66] In 1872, President Hayes established a reservation for the Western Shoshone at Duck Valley in an effort to address their growing displacement.[67] This U.S. federal legal structure of treaties and reservations, created through the executive and legislative branches, provides a space that bounds pre-colonial claims by indigenous peoples in the U.S. legal system.

In 1946, the space to engage expropriation was further altered through Congress's creation of the Indian Claims Commission (ICC).[68] This tribunal was established to adjudicate claims brought by Indian tribes against the United States, including ones "arising from the taking of the United States, whether as a result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without . . . payment . . . or compensation."[69] The establishment of the ICC represented an opportunity for compensation for the taking of land, but also further constrained spaces for redress. The ICC thus became a forum for getting compensation at historical rates, rather than present value, but not for preventing such takings or demanding the return of land. Moreover, this structure existed in the broader context of an ever-developing constitutional jurisprudence based on the Takings Clause of the Fifth Amendment.[70] Interestingly, one of the Inter-American Commission's criticisms of the U.S. government was that it took the Danns' property without meeting the standards of its Takings jurisprudence.[71]

As noted previously, the Danns were forced before the ICC because the Te-Moak Tribe brought a claim in 1951 for damages regarding 22 million acres in Nevada that included the Danns' property.[72] Given the space

64. *See* United States v. Dann, 572 F.2d 222, 224 (9th Cir. 1978).

65. *See supra* note 57 and accompanying text.

66. *See* Treaty of Ruby Valley G Boundaries, http://www.wsdp.org/images/newemap.gif (last visited July 12, 2006) (displaying boundaries of Western Shoshone land).

67. *See Dann*, 572 F.2d at 224.

68. *See* Indian Claims Commission Act of 1946, 79th Cong., 2d Sess., 60 Stat. 1049 (1946).

69. *Dann*, 572 F.2d at 224 (quoting 25 U.S.C. § 70a).

70. *See supra* note 21 and accompanying text.

71. *See* Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L./V/II.117113/01 (2001), ¶ 144.

72. W. Shoshone Identifiable Group v. United States, 35 Ind. Cl. Comm. 457 (1975); *see also supra* notes 46-47 and accompanying text.

created by the ICC, the leaders did not request the land itself, which would have been preferable, but simply compensation for its taking.[73] After years of informal efforts to contest the ICC process, in 1974, a group of Western Shoshone, which included the Danns, attempted unsuccessfully to intervene formally at a late stage in the ICC process to remove their land from the Te-Moak claim.[74] They argued that (1) the title to this land was never extinguished by encroachment; (2) the Te-Moak Tribe plaintiffs did not represent the Western Shoshone and the petitioners did not wish to accept compensation which would nullify future claims; and (3) there was collusion between the cooperating Western Shoshone (The Western Shoshone Identifiable Group) and the U.S. government in including land of other tribes in this claim.[75]

The ICC never reached the merits of the Danns' claim because it denied the requested stay on grounds of timeliness and standing.[76] Over the course of the late 1970s, the ICC completed the final award of $26,145,189.89,[77] the Court of Claims affirmed the award,[78] and the award was certified for payment.[79] Through this process, the Danns' land—which had not been encroached upon and which they continued to inhabit—was deemed to have been expropriated.

As the Danns attempted unsuccessfully to fight the ICC process, additional federal governmental spaces began to close in upon them. The Bureau of Land Management, a federal agency headquartered in Washington, D.C., cited them for trespassing on federal land in the Elko Grazing District by grazing without a permit.[80] The Danns defended themselves by arguing that they and the Western Shoshone people, not the U.S. government, beneficially owned the land and could not be excluded from it.[81] The U.S. government responded that the ICC proceedings had determined that the aboriginal title was extinguished.[82] The cases bounced up and down the federal court system, with the Supreme Court determining that compensation had occurred once payment landed in a Treasury account even though the funds had not been distributed to

73. *See* Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L./V/II.117113/01 (2001), ¶ 16.

74. *See W. Shoshone Identifiable Group*, 35 Ind. Cl. Comm. at 477; *see also* O'Connell, *supra* note 28, at 776-77.

75. *See W. Shoshone Indentifiable Group*, 35 Ind. Cl. Comm. at 459-60, 464.

76. *See id.* at 463.

77. *See* W. Shoshone Identifiable Group v. United States, 40 Ind. Cl. Com.n. 318, 318 (1977), *available at* http://digital.library.okstate.edu/icc/v40/iccv40p453.pdf.

78. *See* Temoack Band of W. Shoshone Indians v. United States, 593 F.2d 994, 1002 (Ct. Cl. 1979).

79. *See* Civil No. R-74-60 (Apr. 25, 1980).

80. *See* United States v. Dann, 572 F.2d 222, 223 (9th Cir. 1978).

81. *See id.*

82. *See id.*

the Western Shoshone.[83] In addition, the Ninth Circuit limited the Danns' claims to land previously held by their ancestors.[84] Carrie Dann has described this set of proceedings as the U.S. government expropriating the land and regarding its own acceptance of payment as compensation.[85]

With no possibilities for redress that recognized their tribal claims within the spaces provided by the U.S. government and faced with ongoing government harassment, the Danns attempted to step outside of these U.S. governmentally-constituted spaces.[86] As a member of the Organization of American States, the U.S. has obligations to the Inter-American Commission on Human Rights and under the American Declaration of the Rights and Duties of Man.[87] Although the Danns succeeded in their claim before the Commission by reframing the situation in terms of international human rights,[88] the U.S. government rejected the decision and refused to take any steps in accordance with it.[89] The Danns had no formal avenues for recourse, as the Commission lacks the ability to enforce the judgment directly and the Inter-American Court on Human Rights does not have jurisdiction over the United States.[90] The Danns thus remained trapped within U.S. governmental spaces despite international recognition of their plight. As if to reinforce that enclosure, soon after the Commission's decision, the U.S. government came to the land inhabited by these two grandmothers with forty armed agents, ATVs and a helicopter in order to seize 227 heads of cattle from them.[91]

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83. *See* United States v. Dann, 470 U.S. 39, 40 (1985).

84. *See* United States v. Dann, 873 F.2d 1189, 1200 (9th Cir. 1989).

85. *See* Notes from University of Idaho College of Law, International Law Symposium, Indigenous Peoples and International Human Rights Law: Lands, Liberties, and Legacies (Coeur d'Alene, ID 2006) [hereinafter Notes] (on file with author).

86. In 1999, the Danns withdrew their claim of individual aboriginal title to avoid conflict with their tribal claim. *See* PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, Annex II, ¶ 29 (2007), *available at* http://www.wsdp.org/US_Periodic_Report_4-07.pdf and http://www.wsdp.org/Annex_II_to_US_Periodic_Report_4-07.pdf.

87. *See* Statute of the Inter-American Commission on Human Rights arts. 18-20, Oct. 31, 1979, O.A.S. G.A. Res. 447 (IX-0/79), *available at* http://www.iachr.org/Basicos/English/Basic17.Statute%20of%20the%20Commission.htm; American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *available at* http://www.iachr.org/Basicos/English/Basic2.American%20Declaration.htm.

88. Dann v. United States, Case 11.140, Inter-Am. C.H.R. 113/Report No. 75/02, OEA/Ser.L/ V/II.117 (2001).

89. *See* Observations, *supra* note 39.

90. *See* Organization of American States, American Convention on Human Rights arts. 2-3, 41–51, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, *available at* http://www.iachr.org/Basicos/basic3.htm, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser. L.V/I.4 Rev. 9 (2003).

91. *See* Ragsdale, *supra* note 28, at 196.

Despite the U.S. rejection of the Commission's decision, international advocacy efforts continued. The Western Shoshone National Council, Timbisha Shoshone Tribe, Winnemucca Indian Colony and Yomba Shoshone Tribe brought a petition under the Early Warning and Urgent Action Procedure of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) regarding the U.S. government's denial of traditional status and recent measures to occupy and use these lands.[92] Because the United States ratified CERD in 1994,[93] its government has an obligation to comply with requests from the Committee for the Elimination of Racial Discrimination.[94] After inviting and failing to receive a timely United States response, the Committee urged the United States to take the above-mentioned interim measures and then reiterated its recommendations in its concluding observations.[95] Although this petition represents an interesting framing—within U.S. domestic jurisprudence, Indian Law claims revolve around sovereignty rather than race—and the U.S. has clear obligations, the Committee's intervention has yet to reconstitute the domestic legal spaces for the Western Shoshone to protect their land. The U.S. response to the Committee's recommendations, which the Committee "strongly regrets," indicates a continuation of the status quo.[96]

3. *Time*

Throughout these bounded legal spaces, problems of time abound. Historical treaties between sovereigns with unequal bargaining power are interpreted through the dominant sovereign's legal system to limit the Danns' present options.[97] The compensation that the U.S. government deposited with its Treasury Department to pay the Danns was at 1872 dollar values rather than present value rates.[98] Moreover, these decisions provide the Danns with the possibility of pursuing individual aboriginal rights claims based on their usage and that of their lineal ancestors at the time that the land became part of the grazing district, but not to aboriginal title claims based on their tribal membership.[99] Their attempt to in-

92. Committee for the Elimination of Racial Discrimination, 68th Sess., *Early Warning and Urgent Action Procedure*, Decision 1(68), ¶¶ 1, 4, United States of America (Geneva, Feb. 20-Mar. 10, 2006).

93. *See* Office of the United Nations High Commissioner on Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, June 9, 2004, http://www.unhchr.ch/pdf/report.pdf.

94. International Convention on the Elimination of All Forms of Racial Discrimination art. 9(1), July 3, 1966, 660 U.N.T.S. 9464, art. 9.

95. *See* Committee for the Elimination of Racial Discrimination, Res. 68/1, *supra* note 40, ¶ 7,; CERD Concluding Observations, *supra* note 43, ¶ 19.

96. CERD Concluding Observations, *supra* note 43, ¶ 19. *Accord supra* note 42.

97. *See supra* note 57 and accompanying text.

98. *See* W. Shoshone Identifiable Group v. United States, 35 Ind. Cl. Comm. 457, 468 (1975).

99. United States v. Dann, 873 F. 2d 1189, 1199 (9th Cir. 1987).

tervene with the ICC and the Te-Moak Tribe's reversal were both deemed untimely,[100] and the United States declined to give a timely response to the Committee on the Elimination of Racial Discrimination.[101]

These dilemmas pale in the face of the time problem underlying this dispute: the uncertain fate of the future generations. If the government can take the Danns' cattle and horses because it treats their herding as trespass, how will the next generation continue traditional ways of life? How can their progeny maintain traditional hunting practices if killing deer through these methods results in criminal charges? The Danns' fight is not simply about their own land, but about the legal barriers to their cultural and spiritual traditions moving forward through time.[102]

Although the Danns' situation provides an individual legal maze, it is also emblematic of the myriad of barriers facing indigenous peoples in the United States that make continuation of their traditional ways of life increasingly difficult. For example, the environmental impacts of climate change in the Arctic pose significant challenges to the Inuit, who filed a petition in the Inter-American Commission claiming that U.S. climate change policy violates their rights.[103] Given the rapid timeframe of devastating climate change in the Arctic and the current pace of greenhouse gas emissions, the options open to address this problem through available legal spaces are limited.[104] Moreover, the Inter-American Commission chose not to make recommendations based on the specific claims in the petition, but instead held a more general hearing on climate change and human rights.[105]

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100. *See W. Shoshone Identifiable Group*, 35 Ind. Cl. Comm. at 463.

101. Committee for the Elimination of Racial Discrimination, 68th Sess., *Early Warning and Urgent Action Procedure*, Decision 1(68), ¶¶ 2-3, United States of America (Geneva, Feb. 20-Mar. 10, 2006).

102. *See* Notes, *supra* note 85.

103. *See* Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (submitted Dec. 7, 2005), at 75–95, *available at* http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf; American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *available at* http://www.iachr.org/Basicos/English/Basic2.American%20Declaration.htm.

104. *See* Susan Joy Hassol, Arctic Climate Impact Assessment, IMPACTS OF A WARMING ARCTIC: ARCTIC CLIMATE IMPACT ASSESSMENT 8 (2004), *available at* http://www.amap.no/acia/index.html [hereinafter "ACIA"]. As Sheila Watt-Cloutier, then-Chair of the Inuit Circumpolar Conference, stated after filing the petition: "How would you respond if an international assessment prepared by more than 300 scientists from 15 countries concluded that your age-old culture and economy was doomed, and that you were to become a footnote to globalization?" Presentation by Sheila Watt-Cloutier, Chair, Inuit Circumpolar Conference, Eleventh Conference of Parties to the UN Framework Convention on Climate Change Montreal, Dec. 7, 2005, *available at* http://www.inuitcircumpolar.com/index.php?ID=318&Lang=En.

105. *See* Letter from Ariel E. Dulitzky, Assistant Executive Secretary, Org. of Am. States, to Paul Crowley, Legal Representative for Sheila Watt-Cloutier et al.

The conflict that began with colonization and officially ended through treaties between sovereigns continues into the future through disputes like that of the Danns. Without spaces that allow for thoughtful reengagement of fairness over time, the Danns face an ongoing reconfiguration of the legal wormholes through which the original colonization deprived their ancestors of land.

B. *Padilla's Days in Courts*

José Padilla's justice wormhole has many similarities to that of the Danns despite its very different substantive legal context. Namely, like other individuals designated as "enemy combatants," he has been caught in the intersection of the War on Terror with criminal law and procedure.[106] Appendix Two provides a chronology of his movement between the criminal justice system and the "enemy combatant" status.

(Nov. 16, 2006), *available at* http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf (regarding Petition No. P-1413-05); Letter from Sheila Watt-Cloutier, Martin Wagner and Daniel Magraw to Santiago Cantón, Executive Secretary, Inter-Am. Comm'n on Human Rights (Jan. 15, 2007) (on file with author); Letter from the Org. of Am. States to Sheila Watt-Cloutier et al. (Feb. 1, 2007) (on file with author) (regarding Petition No. P-1413-05). I have discussed this case in depth elsewhere. *See* Hari M. Osofsky, *Climate Change Litigation as Pluralist Legal Dialogue?*, 43A STAN. J. INT'L L. 181 (2007); Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L.Q. 1789 (2005); Hari M. Osofsky, *The Inuit Petition as a Bridge?: Beyond Dialectics of Climate Change and Indigenous Peoples' Rights*, 31 AM. INDIAN L. REV. 675 (2007).

106. For scholarly analysis of the *Padilla* case and other "enemy combatant" cases, see Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263 (2004); Charles S. Doskow, *Jose Padilla and the Due Process of Law*, 19 ST. THOMAS L. REV. 199 (2006) (providing chronology of case and these developments); Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists:* Hamdan, *the Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165, 1169 (2007) (providing an interesting analysis of "triangulation among the *Hamdan* ruling, international criminal law, and the Geneva Conventions"); Jonathan L. Hafetz, *The Supreme Court's "Enemy Combatant" Decisions: Recognizing the Rights of Non-Citizens and the Rule of Law*, 14 TEMPLE POL. & CIV. RTS. L. REV. 409, 411 (2005); Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863 (2006); Jenny S. Martinez, *José Padilla and the War on Rights*, 80 VA. Q. REV. 56, 56 (2004); Ellen S. Podgor, *Jose Padilla and Martha Stewart: Who Should Be Charged with Criminal Conduct?*, 109 PENN. ST. L. REV. 1059, 1067-68 (2005); Robert J. Pushaw, Jr., *The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1053-54 (2007); Tung Yin, *Procedural Due Process to Determine "Enemy Combatant" Status in the War on Terrorism*, 73 TENN. L. REV. 351, 352 (2006); John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 579-82 (2006); John Yoo, *National Security and the Rehnquist Court*, 74 GEO. WASH. L. REV. 1144, 1147-48 (2006); Michelle Maslowski, Note, *Classification of Enemy Combatants and the Usurpation of Judicial Power by the Executive Branch*, 40 IND. L. REV. 177 (2007); Monica Melchionni, Note, *Confining the Constitution: What the Detainment of Jose Padilla Means to the American People and How Detention Procedures for U.S. Citizens Should Be Amended to Include Protections Similar to Those Imbedded in the Civil Commitment System*, 25 QUINNIPIAC L. REV. 251 (2006); Samantha A. Pitts-Kiefer, Note, *Jose Padilla: Enemy Combatant or Common Criminal?*, 48 VILL. L. REV. 875 (2003).

Padilla has spent the last five years in detention, generally with limited access to his attorneys. He was detained in May 2002 in Chicago on a material witness warrant[107] and then was moved into federal criminal custody in New York.[108] After classifying him as an "enemy combatant" a month later, the government moved him to the Consolidated Naval Brig in Charleston, South Carolina.[109] In 2005, a federal grand jury indicted Padilla, which resulted in his early 2006 transfer to Florida—and the criminal justice system—to face trial. The trial resulted in a unanimous conviction and Padilla was sentenced on January 22, 2008, to an additional seventeen years and four months in prison.[110] Since Padilla's initial detention, three district courts,[111] three circuit courts,[112] and the Supreme Court have addressed aspects of his case multiple times,[113] with no substantive resolution of whether his several-year "enemy combatant" designation was appropriate.[114] U.S. District Court Judge Marcia Cooke's taking Padilla's "harsh" detention conditions into account when she shortened his sentence from the government's recommended thirty years to life term represents the most significant instance of his receiving improved treatment as a result of his ordeal.[115]

The case against him similarly has varied over time. Initially, the federal Executive Branch refused to describe the charges on national security grounds. Then, on June 1, 2004, as the Supreme Court deliberated for the first time regarding his case, officials held a press conference to de-

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107. *See* Rumsfeld v. Padilla, 542 U.S. 426, 430 (2004).

108. *See id.* at 431.

109. *See id.* at 431-32.

110. *See* Hanft v. Padilla, 546 U.S. 1084 (2006); Padilla v. Hanft, 547 U.S. 1062 (2006); United States v. Padilla, No. 04-60001-CR, 2007 WL 1079090, at *1 (S.D. Fla. Apr. 9, 2007); Verdict, United States v. Padilla, No. 04-60001, 2007 WL 2349148 (S.D. Fla. Aug. 16, 2007); *Padilla Given Long Jail Sentence*, BBC NEWS, Jan. 23, 2008, *available at* http://news.bbc.co.uk/2/hi/americas/7203276.stm; Department of Justice, Press Release, *Jose Padilla and Co-defendants Sentenced on Terrorism Charges*, Jan. 22, 2008, *available at* http://www.usdoj.gov/opa/pr/2008/January/08_nsd_046.html.

111. *See* United States v. Padilla, No. 04-CR-60001 (S.D. Fla. Aug. 18, 2006); Padilla v. Hanft, 389 F. Supp. 2d 678 (D.S.C. 2005); Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 569-70 (S.D.N.Y. 2002).

112. *See* United States v. Hassoun, 476 F.3d 1181, 1184-85 (11th Cir. 2007); Padilla v. Hanft, 423 F.3d 386, 397 (4th Cir. 2005); Padilla v. Rumsfeld, 352 F.3d 695, 724 (2d Cir. 2003).

113. *See* Rumsfeld v. Padilla, 542 U.S. 426, 715 (2004), *cert. denied*, Padilla v. Hanft, 545 U.S. 1123, 1123 (2005), *cert. denied*, 547 U.S. 1062, 1062 (2006).

114. *See infra* Appendix 2.

115. *See* Debra Cassens Weiss, *Judge Lowers Padilla Sentence Because Harsh Confinement*, ABA JOURNAL, Jan. 22, 2008, *available at* http://www.abajournal.com/news/judge_lowers_padilla_sentence_because_of_harsh_confinement/; Carol J. Williams, *Padilla Gets Unexpected Sentence*, L.A. TIMES, Jan. 23, 2008, *available at* http://www.latimes.com/news/nationworld/nation/la-na-padilla23jan23,0,7017231.story; *Padilla Given Long Jail Sentence*, *supra* note 110.

scribe the claims against him.[116] Finally, in the criminal indictment announced on November 22, 2005, as the Supreme Court considered Padilla's third certiorari petition, the case against him was made on completely different grounds, upon which he was convicted on August 16, 2007.[117]

Judge Luttig's response to this final move helps to describe the shifting contours of the wormhole:

> For, as the government surely must understand, although the various facts it has asserted are not necessarily inconsistent or without basis, its actions have left not only the impression that Padilla may have been held for these years, even if justifiably, by mistake—an impression we would have thought the government could ill afford to leave extant. They have left the impression that the government may even have come to the belief that the principle in reliance upon which it has detained Padilla for this time, that the President possesses the authority to detain enemy combatants who enter into this country for the purpose of attacking America and its citizens from within, can, in the end, yield to expediency with little or no cost to its conduct of the war against terror—an impression we would have thought the government likewise could ill afford to leave extant. And these impressions have been left, we fear, at what may ultimately prove to be substantial cost to the government's credibility before the courts, to whom it will one day need to argue again in support of a principle of assertedly like importance and necessity to the one that it seems to abandon today. While there could be an objective that could command such a price as all of this, it is difficult to imagine what that objective would be.[118]

This Section traces the geography of this journey—captured so well by Judge Luttig, whose preceding substantive opinion was sympathetic to the Bush Administration's approach—and its implications for the structure of criminal justice.[119] In particular, this Section uses the vectors of space, place and time to explore José Padilla's troubling journey through the U.S. legal system.

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116. *See* James Comey, Deputy Att'y Gen., Remarks Regarding Jose Padilla (June 1, 2004), *available at* http://www.usdoj.gov/archive/dag/speeches/2004/dag6104.htm.

117. *See* Verdict, United States v. Padilla, No. 04-60001, 2007 WL 2349148 (S.D. Fla. Aug. 16, 2007); *see also* Comey, supra note 116 (describing claims against Padilla); Doskow, *supra* note 106 (providing chronology of case and these developments).

118. Padilla v. Hanft, 432 F.3d 582, 587 (4th Cir. 2005).

119. *See* Padilla v. Hanft, 423 F.3d 386, 389 (4th Cir. 2005).

1. *Place*

As with the *Dann* case, ties to place have played a material role in Padilla's journey through the U.S. legal system. Padilla has been moved quite literally from place to place, and government attorneys have used that movement to evade judicial review. When Padilla was transferred from criminal custody in New York to a Navy brig in South Carolina, his attorney learned of his new location through the media.[120] The U.S. Supreme Court used that relocation as a basis for holding that the district court in New York lacked jurisdiction and for therefore requiring Padilla to refile his habeas claim in South Carolina.[121] Filing in the "wrong place" became a mechanism for continuing detention with no review of whether he deserved to be labeled an "enemy combatant."

The second shift back into the criminal justice system—in which he was convicted despite fairness concerns about the impact of his treatment in detention and his former designation as an enemy combatant—changed his location once again, this time to Florida.[122] Judge Luttig, in the same opinion quoted above, suggested that the government's actions provided "at least an appearance that the government may be attempting to avoid consideration of our decision by the Supreme Court."[123] Despite Judge Luttig's protestation about the "enemy combatant" claims being relinquished without resolution, the Supreme Court declined to review the appropriateness of that designation yet again.[124] Just as the first transfer between places constituted a justice wormhole, the second one prevented a resolution of its appropriate contours.

Ties to place undergirded the substantive legal debate as well. Padilla's citizenship connections to and arrest within the physical boundaries of the United States have played an important role in his case. Those linkages have served as grounds for his attorneys to argue for his right to basic procedural protections and have been an important part of how courts have framed his habeas claim. For example, in her dissent from the Supreme Court's denial of certiorari regarding Padilla's "enemy combatant" status following his transfer to Florida, Justice Ginsburg stated:

> Does the President have authority to imprison indefinitely a United States citizen arrested on United States soil distant from a zone of combat, based on an Executive declaration that the citizen was, at the time of his arrest, an "enemy combatant"? It is a

120. *See* Martinez, *supra* note 106, at 58-59.

121. *See* Rumsfeld v. Padilla, 542 U.S. 426, 441, 447 (2004).

122. *See* Verdict, United States v. Padilla, No. 04-60001, 2007 WL 2349148 (S.D. Fla. Aug. 16, 2007). For further discussion of the fairness concerns regarding Padilla's treatment and enemy combatant designation, see Interview by Juan Gonzalez and Amy Goodman with Dr. Angela Hegarty, Assistant Professor of Clinical Psychiatry, Columbia Univ. (Aug. 16, 2007) (transcript available at www.Democracynow.org/article.pl?sid=07/08/16/1416242#transcript).

123. *Padilla*, 432 F.3d at 583.

124. *See* Padilla v. Hanft, 547 U.S. 1062 (2006) (order denying certiorari).

> question the Court heard, and should have decided, two years ago.[125]

Although the impact of Padilla's territoriality and nationality ties to the United States was never resolved judicially because of that denial of the writ, those ties have helped to shape the controversy that his case has engendered and the portrayals of its broader civil liberties implications. His case leaves open the possibility that he or other citizens could be pulled out of the criminal justice system with very little meaningful due process protection. That unresolved issue raises a fundamental question about what it means to be "safe" as a U.S. citizen in the post-9-11 environment: is it safety from terrorists or from arbitrary detention by the government?[126]

As a factual matter, Padilla's citizenship played a critical role in the U.S. government's ability to track and ultimately arrest him. Padilla visited the Pakistani embassy in February 2002 to request a new passport, claiming that he had lost his; in so doing, he helped to trigger the U.S. authorities' interest in him.[127] His citizenship ties to the United States made that request necessary to legal travel—most critically, the passport allowed for his reentry into this country—but he had to obtain the documentation of citizenship in Pakistan, which made the request more noticeable. Similarly, at least in part because he was a citizen, U.S. authorities did not refuse him entry to the country, but rather detained him upon arrival to Chicago.[128] His citizenship status, in that sense, quite literally began his journey through U.S. detention and courts.

Moreover, the legal determinations of his status interacted in complex ways with his citizenship. On the same day that the Supreme Court clarified the due process protections for citizen-detainees in *Hamdi v. Rumsfeld*,[129] it declined to reach the merits of Padilla's case and instead dismissed it on procedural grounds.[130] When the Fourth Circuit considered

125. *Id.* at 1064 (Ginsburg, J., dissenting).

126. For a thoughtful analysis of the way in which Padilla and other post-9-11 War on Terror cases have changed category of citizenship, see Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Psuedo-Citizen*, 38 U.C. DAVIS L. REV. 79, 86-87 (2004); *see also* Saad Gul, *Return of the Native? An Assessment of the Citizenship Renunciation Clause in Hamdi's Settlement Agreement in the Light of Citizenship Jurisprudence*, 27 N. ILL. U. L. REV. 131 (2007); Rory T. Hood, *Guantanamo and Citizenship: An Unjust Ticket Home?*, 37 CASE W. RES. J. INT'L L. 555 (2006); Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror,"* 26 PACE L. REV. 1 (2005); Natsu Taylor Saito, *Border Constructions: Immigration Enforcement and Territorial Presumptions*, 10 J. GENDER RACE & JUST. 193 (2007); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005).

127. *See* Comey, *supra* note 116.

128. *Cf.* Stumpf, *supra* note 106 (discussing contours of Padilla's citizenship status). For a discussion of legal spatiality in the context of Guantanamo detainees, see Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2504 (2005).

129. 542 U.S. 507 (2004).

130. *See* Rumsfeld v. Padilla, 542 U.S. 426, 430 (2004).

the implications of Justice O'Connor's opinion in *Hamdi* for Padilla, it relied upon the Supreme Court ruling to reject Padilla's claims regarding his detention, but not to consider the due process protections he deserved as a citizen.[131] Due process merits a brief mention in a footnote[132] before the opinion goes on to hold that Padilla's detention, like Hamdi's, is authorized by The Authorization for Use of Military Force Joint Resolution.[133] The citizenship that, after *Hamdi*, should have limited Padilla's wormhole and the time-space in which it deposited him provided little basis for relief.[134] Although *Hamdi* arguably helped to put pressure on the Executive Branch that ultimately led to Padilla's recategorization, the legal system's failure to rely directly upon it to provide him with additional due process protection reinforces the peculiar quality of Padilla's wormhole.[135]

Beyond these formal legal contexts, Padilla's sociocultural connections to place have impacted the public understanding of his case. Consider, for example, the question of what he should be called. Although this Article references him as José Padilla—the surname he was born with and the one most commonly used to reference him in the popular press and academic literature—he renamed himself Abdullah al-Muhajir while in prison in the 1990s. While the former name connects him to his Roman Catholic Puerto Rican origins, the latter one indicates his conversion to Islam while in Florida, a conversion that motivated his travels to Egypt, Afghanistan and Pakistan.[136] Moreover, each of those idenities are themselves multilayered. For example, the complex relationship between the United States and Puerto Rico interacts with culture and identity issues.[137]

The name question did not end with the dilemma of which one to choose. The issue of how to pronounce his birth surname, Padilla, also has been the subject of much controversy. Although that name is of Spanish-language origin, the public pronunciation of his name has vacillated between a Spanish and an anglicized one, Pa-dill(like the pickle)-uh. Since NPR's January 2007 decision to use the Spanish pronunciation, that

131. *See* Padilla v. Hanft, 423 F.3d 386, 391 (4th Cir. 2005).

132. *See id.* at 391 n.2.

133. *See id.* at 391-92.

134. For a discussion of these concerns, see Doskow, *supra* note 106, at 214-16, 225-28.

135. For such an argument, see David A. Martin, *Judicial Review and the Military Commissions Act: On Striking the Right Balance*, 101 AM. J. INT'L L. 344, 348-49 (2007).

136. *See* Amanda Ripley, *The Case of the Dirty Bomber*, TIME, June 16, 2002, *available at* http://www.time.com/time/nation/article/0,8599,262917,00.html.

137. *See, e.g.*, PEDRO A. MALAVET, AMERICAN'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO (2004) (exploring implications of legal status of Puerto Rico for treatment of Puerto Ricans); Angel R. Oquendo, *Liking to be in America: Puerto Rico's Quest for Difference in the United States*, 14 DUKE J. COMP. & INT'L L. 249 (2004) (exploring "the extent to which Puerto Rican cultural sovereignty is compatible with the U.S. constitutional framework").

one has been favored in public commentary.[138] Numerous web postings display public reaction, both positive and negative, to that pronunciation decision. Many of them express opinions about how Padilla relates to his ethnic heritage.[139] These questions of name and pronunciation thus help to determine where his public identity is located and, as a result, how people respond to it. In the process, this issue of no direct legal relevance to the case has become part of how people react to Padilla and his plight.

As with the *Dann* case, these ties to place open up issues of space. As a legal matter, questions arise about the contours of the space that Padilla inhabits. Is he entitled to some of the due process protections that the criminal justice system, based on the U.S. Constitution, provides? If so, what role does his citizenship play in that entitlement? More broadly, in both the legal and socio-cultural discourse, considerations of insider and outsider status abound. Do his various ties to place make him "one of us" or "other"? To what extent do "others" inhabit a different space in the U.S. legal system? The next Section, on space, takes up these dilemmas.

2. *Space*

The legal space that most fundamentally shaped Padilla's journey through the U.S. legal system is the category "enemy combatant." As discussed extensively in the case briefing, opinions and scholarly literature, that designation was not created from the statutory and executive response to 9-11.[140] Rather, the Executive Branch has relied upon the use of the term in a Supreme Court decision during World War II, *Ex parte Quirin*.[141] The case involved several German citizens, and one person whose United States versus German citizenship status was ambiguous, who entered the United States during World War II carrying explosives. The government contended that "because they are enemy aliens or have entered our territory as enemy belligerents," they "must be denied access to the courts."[142]

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138. *See* Andy Bowers, *Does Not Rhyme with "Tortilla": How Jose Padilla Pronounces His Name*, SLATE, Nov. 22, 2005, http://www.slate.com/id/2130925/; *CNN Live Today: Criminal Indictment Announced Against Jose Padilla* (CNN television broadcast Nov. 22, 2005) (transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0511/22/lt.03.html); Kee Malesky & Alex Chadwick, *A Change in NPR Pronunciation for Padilla*, Jan. 5, 2007, http://www.npr.org/templates/story/story.php?storyId=6729347.

139. *See, e.g.*, Postings to AFF's Brainwash: Jose Padilla's Rights, http://www.affbrainwash.com/genehealy/archives/020627.php (Jan. 6, 2006); Joe Loya, *Alleged 'Dirty Bomber' and I Would Have Been Prison Buddies*, NEW AM. MEDIA, June 12, 2002, http://news.newamericamedia.org/news/view_article.html?article_id=531; Postings to Topix: Opening Statements to be Heard Today in Jose Padilla Terror Trial, http://www.topix.net/forum/news/terrorism/TTDU6QAE45LSQOQ9O (May 14, 2007); Postings to Unfogged: Comment on Pendant News, http://www.unfogged.com/archives/comments_4303.html (Nov. 22-23, 2005).

140. For analyses of "enemy combatant" cases, see *supra* note 106.

141. 317 U.S. 1 (1942).

142. *Id.* at 24.

The Court in *Ex parte Quirin*, however, chose not to go that far. The opinion explains that:

> neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission. As announced in our per curiam opinion we have resolved those questions by our conclusion that the Commission has jurisdiction to try the charge preferred against petitioners. There is therefore no occasion to decide contentions of the parties unrelated to this issue.[143]

Moreover, it narrowly holds that the specific facts of that context, many of which differ from Padilla's situation, make trial by military commission acceptable.[144]

Most relevant to the legal dialogue over Padilla, the Court describes an "enemy combatant" as follows:

> By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.[145]

"Enemy combatant" thus appears to be a sub-category of unlawful combatant, which moves the people involved from the legal space of "prisoners of war" to one of "offenders against the law of war." This status delineation provides the basis for the appropriateness of a hearing by military tribunal.[146]

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143. *Id.* at 25.

144. *See id.* at 46-48.

145. *Id.* at 30–31.

146. For further discussion of "enemy combatant" designation, see *supra* note 106.

As Padilla's lawyers have argued repeatedly, there are a number of reasons why the facts of his case should fall outside of the space delineated in *Ex parte Quirin*.[147] Most significantly, the Non-Detention Act prevents citizens from being detained without an Act of Congress.[148] The statute upon which the Executive Branch relied to meet that requirement, the Authorization for Use of Military Force, has been found by the Court to do so in the context of overseas battlefields.[149] The Court has said nothing, however, to indicate that the statute provides sufficient grounds for detention of U.S. citizens obtained in a domestic, civilian context.[150]

The focus of this Section's analysis is not simply to reargue the merits of Padilla's case, but rather to attempt to capture the contours of the justice wormhole that was created. The biggest problem from a justice perspective is not simply the invocation of the "enemy combatant" category with respect to Padilla—many have argued that 9-11 shifted sufficiently the balance between liberty and security to make such a category defensible with sufficient congressional authorization[151]—but rather that the legal system gave him no space to resolve the appropriateness of such a designation. The Supreme Court declined to engage the merits of his case on three different occasions[152] despite a clear split between the Second and Fourth Circuits by Padilla's final certiorari petition and despite O'Connor's opinion in *Hamdi*.[153] In so doing, the Court left open the possibility that Padilla, or any other citizen, might suddenly be put again into indefinite detention with no clear mechanism for contesting the claims against him or her.[154]

3. *Time*

As with the Danns, Padilla's travails involved not only a problematic creation of legal space, but a warping of the way in which time ordinarily operates in the legal system. In the most basic material sense, the U.S. government detained Padilla from May 8, 2002, until November 22, 2005, without criminal charges or a hearing. Moreover, the government has not closed the door on reinstating that legal limbo at a later point. Detaining

147. *See* Brief of Petitioner for Writ of Certiorari at 17-18, Padilla v. Hanft, No. 05-533, 2005 WL 2822914 (Oct. 25, 2005).

148. *See id.* at 18.

149. *See id.* at 17.

150. *See id.* at 18.

151. The proper balance between civil liberties and security has been hotly contested in the post-9-11 context. *Compare, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2054 (2005), *with* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 957 (2002).

152. *See* Padilla v. Hanft, 547 U.S. 1062 (2006); Padilla v. Hanft, 545 U.S. 1123 (2005); Rumsfeld v. Padilla, 542 U.S. 426 (2004).

153. *See* Brief of Petitioner for Writ of Certiorari at 6, Padilla v. Hanft, No. 05-533, 2005 WL 2822914 (Oct. 25, 2005).

154. For further analysis of this issue, see *supra* note 106.

a citizen for that length of time in that fashion, with the possibility of a repeat performance, flies in the face of U.S. constitutional protections.[155]

Although such a detention, alone, flouts the spaces for procedural protection provided in the U.S. legal system, a bigger time problem underlies Padilla's story. The Executive Branch consistently asserted that it could use the category of "enemy combatant" to detain Padilla indefinitely.[156] That designation becomes not only a space in which the accused may not be entitled to a hearing, but also one that has no apparent end.[157]

The system of checks and balances ostensibly would protect against such a warping of how our legal system treats time. The judicial branch had multiple opportunities to close off the wormhole transporting Padilla into "enemy combatant" status, and both the Second Circuit and District of South Carolina attempted to do so.[158] But the U.S. Supreme Court's final denial of Padilla's writ of certiorari left that issue unresolved.[159] Congress has not yet promulgated a new statute that clarifies exactly when and for how long "enemy combatant" status can be invoked.[160] By their fail-

155. For a discussion of time and history in the "enemy combatant" context, see Mitchell Gordon, *Adjusting the Rear-View Mirror: Rethinking the Use of History in Supreme Court Jurisprudence*, 89 MARQ. L. REV. 475 (2006); *cf. supra* note 106 (analyzing "enemy combatant" designation).

156. ASS'N OF THE BAR OF THE CITY OF N.Y., COMM. ON FED. COURTS, THE INDEFINITE DETENTION OF "ENEMY COMBATANTS": BALANCING DUE PROCESS AND NATIONAL SECURITY IN THE CONTEXT OF THE WAR ON TERROR (2004), *available at* http://www.abcny.org/pdf/1C_WL06!.pdf.

157. Justice Ginsburg expressed this concern in her dissent from denial of certiorari. *See* Padilla v. Hanft 547 U.S. 1062 (2006) (Ginsburg, J., dissenting).

158. *See* Padilla v. Rumsfeld, 352 F.3d 695, 724 (2d Cir. 2003); Padilla v. Hanft, 389 F. Supp. 2d 678, 692 (D.S.C. 2005).

159. *See* Padilla v. Hanft, 547 U.S. 1062 (2006).

160. For various perspectives on recent legislation regarding detainee treatment and military commissions, see Norman Abrams, *Developments in US Anti-Terrorism Law*, 4 J. INT'L CRIM. JUST. 1117, 1117-118 (2006); Janet Cooper Alexander, *Jurisdiction-Stripping in the War on Terrorism*, 2 STAN. J. C.R. & C.L. 259 (2006); Edward Babayan, *S. 3930/H. R. 6166, Military Commissions Act of 2006*, 14 HUM. RTS. BRIEF 48 (2006); Jay Alan Bauer, *Detainees Under Review: Striking the Right Constitutional Balance Between the Executive's War Powers and Judicial Review*, 57 ALA. L. REV. 1081, 1085 (2006); Michael C. Dorf, *The Orwellian Military Commissions Act of 2006*, 5 J. INT'L CRIM. JUST. 10 (2007); Stephen Ellmann, *The "Rule of Law" and the Military Commission*, 51 N.Y.L. SCH. L. REV. 761 (2006/07); George P. Fletcher, Hamdan *Confronts the Military Commissions Act of 2006*, 45 COLUM. J. TRANSNAT'L L. 427 (2007) (examining Military Commissions Act of 2006); Arthur H. Garrison, Hamdan v. Rumsfeld, *Military Commissions, and Acts of Congress: A Summary*, 30 AM. J. TRIAL ADVOC. 339 (2006); Jonathan Hafetz, *Torture, Judicial Review, and the Regulation of Custodial Interrogations*, 62 N.Y.U. ANN. SURV. AM. L. 433, 436 (2007); Julian Ku & John Yoo, Hamdan v. Rumsfeld: *The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179 (2006); Ari D. MacKinnon, *Counterterrorism and Checks and Balances: The Spanish and American Examples*, 82 N.Y.U. L. REV. 602 (2007); Guénaël Mettraux, *Comparing the Comparable: 2006 Military Commissions v. the ICTY*, 5 J. INT'L CRIM. JUST. 59 (2007); Richard v. Meyer, *When a Rose is not a Rose: Military Commissions v. Courts-Martial*, 5 J. INT'L CRIM. JUST. 48 (2007); Joseph R. Pope, *The Lasting Viability of* Rasul *in the Wake of the Detainee*

ures to act, the legislative and judicial branches have allowed for the possibility of a new variation of the *Padilla* case to take place in the future.

That possibility, like in the *Dann* case, is at the heart of the time problem. For the Danns, the justice wormhole may well foreclose future generations from continuing their way of life on their family's traditional lands. After Padilla's case, citizens can no longer feel secure that they live under a legal system with basic civil liberties protections. The problem is not merely that Padilla was detained too long, but rather that the Executive Branch asserted that it was not constrained by time with respect to designated categories of people. The verdict in Padilla's criminal case is the first decision on the merits since his initial detention.[161]

Although most of us may rest easy knowing we have not consorted with Al-Qaeda, the post-9-11 legal environment is littered with stories of people who happened to be in the wrong place at the wrong time.[162] While some of them have been able to tell their stories, we do not know how many such people—particularly those without the (diminished) protections of U.S. citizenship—remain detained indefinitely at Guantanamo and elsewhere, being "made into spaghetti"[163] by the U.S. legal system.

III. REMAPPING WORMHOLES IN THREE VARIATIONS

The wormholes in these two cases have a core similarity. In both instances, the United States simultaneously asserts its authority as a nation-state to determine the fate of the petitioners and relies upon exceptionalism—with respect to how it categorizes Padilla and the Danns and to how it handles its own compliance with international norms—to create wormholes that threaten the possibilities for justice. In so doing, the United States articulates a vision of domestic and international lawmaking grounded in nation-state authority.[164] Although the U.S. government formally recognizes international law and institutions and submits responses to them, the United States—as a practical matter—acts as though it constitutes an enclosed space. This presumption raises foundational questions about the space occupied by this nation-state at the center of the accounts.

The nation-state, however, is not simply a "space," but also a "scale"; the "United States" references a specific, national level of governance. Yet

Treatment Act of 2005, 27 N. ILL. U. L. REV. 21 (2006); Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73 (2007).

161. *See* Verdict, United States v. Padilla, No. 04-60001, 2007 WL 2349148 (S.D. Fla. Aug. 16, 2007).

162. For examples of these stories, see *infra* notes 235–237 and accompanying text.

163. *See* HAWKING, *supra* note 1 and accompanying text.

164. The treaties underlying the Peace of Westphalia established the nation-state as the primary subject and object of international law. *See* Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies, Preamble, Oct. 24, 1648, *available at* http://www.yale.edu/lawweb/avalon/westphal.htm (hereinafter Peace Treaty).

the significance of identifying and functioning at that level is complex. Is the United States an enclosed space atop a scalar hierarchy based on its power, or a multi-constituted entity that interacts constantly with many others in a less-ordered framing? How does the social construction of the legal entity, the United States, impact its ability to assert these exceptional spaces? Can an entity made up of and democratically constituted by individuals truly be impenetrable? How do the formal legal mechanisms interact with the informal ones?

Just as the geography literature grapples with the ambiguity of "space," it also analyzes the meaning of "scale" and how one should envision the federal level of decisionmaking that dominates these cases.[165] The key insight of the relevant geographic literature is that "scale," like "space," emerges from ever-shifting social and cultural terrain. As McMaster and Sheppard summarize,

> [a]lthough the relative merits of, and relations among . . . different perspectives of the construction of scale are still the subject of lively debate . . . , there is consensus on the need to move away from thinking about geographic scales as pregiven dimensions of society, to thinking about their social construction.[166]

Moreover, a substantial number of these geography scholars have analyzed how the nation-state as a scale and as a space fits within the changing structure of transnational governance.[167] For the purposes of understanding justice wormholes, then, this literature suggests that multiple understandings of the "United States" are possible, each of which might cause a different narration of these two case examples. This discourse provides a set of conceptual tools for engaging the above questions about how the nation-state should be viewed and about how it interacts with other levels of governance and types of actors in these cases.

What makes the geography literature's analysis of scale helpful, however, is not simply its agreement over the need to treat scale as a social phenomenon, but also its debates over what should be included in the category of "scale." A recent interchange among leading geographers Sally Marston, Neil Brenner, Neil Smith and Mark Purcell is emblematic of the issues raised. Marston wrote an article in 2000 that criticizes scholar-

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165. For a summary of the different models of scale in the geography literature, see NEIL BRENNER, NEW STATE SPACES: URBAN GOVERNANCE AND THE RESCALING OF STATEHOOD 9 (Oxford Univ. Press 2004).

166. McMaster & Sheppard, *supra* note 27, at 18-19.

167. *See, e.g.*, BRENNER, *supra* note 165; Becky Mansfield, *Beyond Rescaling: Reintegrating the 'National' as a Dimension of Scalar Relations*, 29 PROGRESS IN HUM. GEOGRAPHY 458 (2005); Murphy, *supra* note 4. Legal scholars grapple with questions of evolving sovereignty as well. *See, e.g.*, THE FLUID STATE: INTERNATIONAL LAW AND NATIONAL LEGAL SYSTEMS (Hilary Charlesworth et al. eds., 2005); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293 (1996).

ship on scale for "ignoring social reproduction and consumption."[168] Brenner replied in 2001 by raising a concern about the "the analytical blunting of the concept of geographical scale as it is applied, often rather indeterminately, to an expanding range of sociospatial phenomena, relations and processes."[169] His piece accuses Marston, among other things, of "overstretching of the concept of geographical scale"[170] and argues that scale analysis should focus only on what he terms "plural" conceptions of the politics of scale, which focus on interactions among levels rather than within a level.[171] Marston, together with Smith, replied in 2001.[172] Most notably, for the purposes of this discussion, they criticize Brenner for "the same slippage between scale and space that he rejects"[173] in his analysis and of being unreflective in his categorizing of her analysis as not about scale.[174] Purcell commented on this exchange in 2003 as an example of what he terms "islands of practice"; he argues that each scholar makes important points, but fails to engage with the other's ideas.[175] In 2007, Marston, together with John Paul Jones III and Keith Woodward, responded to the ongoing debate by writing a controversial piece arguing for the abandonment of the idea of scale in favor of a "flat ontology."[176]

These debates are emblematic of the contribution that the geography literature can make to legal analysis of scalar issues. Namely, this literature asks basic questions, often underexplored in the legal discourse, about what we should be including when we delineate a scale or describe multiscalar dynamics. It provides the basis for exploring more deeply the extent to which the levels of governance that law delineates are fixed or fluid.[177]

168. Sallie A. Marston, *The Social Construction of Scale,* 24 PROGRESS IN HUM. GEOGRAPHY 219, 219 (2000).

169. Neil Brenner, *The Limits to Scale? Methodological Reflections on Scalar Structuration,* 25 PROGRESS IN HUM. GEOGRAPHY 591, 592 (2001).

170. *Id.* at 598.

171. *Id.* at 600-01.

172. Sallie A. Marston & Neil Smith, *States, Scales and Households: Limits to Scale Thinking? A Response to Brenner,* 25 PROGRESS IN HUM. GEOGRAPHY 615, 616 (2001).

173. *See id.*

174. *Id.* at 617-18.

175. Mark Purcell, *Islands of Practice and the Marston/Brenner Debate: Towards a More Synthetic Critical Human Geography,* 27 PROGRESS IN HUM. GEOGRAPHY 317 (2003).

176. Sallie A. Marston, John Paul Jones III & Keith Woodward, *Human Geography Without Scale,* 30 TRANSACTIONS OF THE INST. OF BRIT. GEOGRAPHERS 416 (2005).

177. For discussion of issues of fixity and fluidity in the geography literature, see Andrew Herod, *Scale: The Local and the Global, in* KEY CONCEPTS IN GEOGRAPHY 229, 234-42 (Sarah L. Holloway, Stephen P. Rice & Gill Valentine eds., 2003); Erik Swyngedouw, *Excluding the Other: The Production of Scale and Scaled Politics, in* GEOGRAPHIES OF ECONOMIES 167, 169 (Roger Lee & Jane Wills eds., 1997); Erik Swyngedouw, *Neither Global nor Local: "Globalization" and the Politics of Scale, in* SPACES OF GLOBALIZATION: REASSERTING THE POWER OF THE LOCAL 137, 141 (Kevin R. Cox ed., 1997); Neil Brenner, *Between Fixity and Motion: Accumulation, Territorial Organization and the Historical Geography of Spatial Scales,* 16 ENV'T AND PLAN. D: SOC'Y AND SPACE 459, 461 (1998); Kevin R. Cox, *Spaces of Dependence, Spaces of Engagement and the Politics of Scale, Or: Looking for Local Politics,* 17 POL. GEOGRAPHY 1,

This scholarship also assists with an analysis of how the territorial extent of a legal entity does and should compare to the scale of the problems that it considers.[178] Most critical for an analysis of justice wormholes and of how one might reconstitute them, it considers the nature of the rescaling processes that take place in the creation, implementation and interpretation of law.[179]

For the purposes of this Article's inquiry, the often contentious discourse over basic definitional questions raises core issues about how we should describe the United States in the *Dann* and *Padilla* cases. First, what should an analysis of United States' behavior include? How does its formal legal construction of these wormholes interact with socio-cultural understandings of the nation-state's role? Second, and related to this first set of questions, how should we intertwine understandings of the nation-state as a space and as a scale? To what extent does our understanding of the cases and possibilities for reconstructing them vary based on the way in which we model the United States?

Such questions are not merely theoretical semantics. Consider, for instance, the United States' decision in the *Dann* case to tell the Committee on the Elimination on Racial Discrimination, to which it has binding treaty-based commitments, that the issues raised before it are not appropriate for its consideration.[180] In one narrative, the United States is flouting its relative power to reject international-level decisionmaking. In another, the United States is protecting its territorial sovereignty from the inappropriate incursions of an international body. How does one decide which story to tell, or whether to narrate this situation entirely differently?

The first set of questions directs us to identify the differences between the formal and informal story. As a formal matter, one might consider whether the treaty covers these matters or not, an issue that may be ambiguous. More broadly, the United States' ability to "get away" with this statement, whether or not the treaty allows it, provides insight into its role in international governance. The second set of questions builds upon the first by pushing us towards a thicker understanding of the United States as an actor in this conflict. It is not only operating at a different level of

19-21 (1998); David Delaney & Helga Leitner, *The Political Construction of Scale*, 16 POL. GEOGRAPHY 93, 93 (1997); Deborah G. Martin, *Transcending the Fixity of Jurisdictional Scale*, 17 POL. GEOGRAPHY 33, 35 (1998); Anssi Paasi, *Place and Region: Looking through the Prism of Scale*, 28 PROGRESS IN HUM. GEOGRAPHY 536, 542-43 (2004).

178. For analyses of issues of extent and resolution, see Robert B. McMaster & Eric Sheppard, *Introduction: Scale and Geographic Inquiry*, *in* SCALE AND GEOGRAPHIC INQUIRY: NATURE, SOCIETY AND METHOD 1, 5-6 (Eric Sheppard & Robert B. McMaster eds., 2003); Nathan F. Sayre, *Ecological and Geographical Scale: Parallels and Potential for Integration*, 29 PROGRESS IN HUM. GEOGRAPHY 276, 281 (2005); Neil Smith, *Geography, Difference and the Politics of Scale*, *in* POSTMODERNISM AND THE SOCIAL SCIENCES 57, 73-74 (Joe Doherty, Elspeth Graham & Mo Malek eds., 1992).

179. For an example of an in-depth examination of those processes, see BRENNER, *supra* note 165, at 9-11.

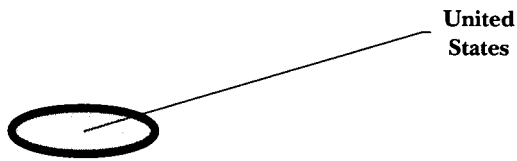
180. *See supra* notes 92-96 and accompanying text.

governance than the Committee on the Elimination of Racial Discrimination, but also attempting to define itself as a distinct sociolegal space. The United States asserts its ability to say "no" to the Committee by constructing itself as an entity bounded by sovereignty that can create clearly enforceable prescriptions in contrast with the Committee's broader geographical coverage and nation-state-given authority. What we include in the analysis may not resolve which narrative is "correct," but it changes how we consider the conflict.[181]

This Part explores these questions by presenting three different visions of the United States space in the *Dann* and *Padilla* cases, each of which draws from the geography literature on scale. Unlike in some of my other scholarship, in which the focus has been on what a model of international lawmaking should include and how that affects the narrative, these visions are not focused on international law per se (although they certainly interact with it).[182] Rather, I am trying to map the contours of what constitutes the United States and the implications of that model for remapping the wormholes.

The first section provides a narrative of the United States as an enclosed space and as the primary scale. It considers the contours of such a space and the possibilities for legal change within it. The next section then turns to an intermediate model in which the nation-state's enclosure and primacy are incomplete because of the many ways in which its "borders" are permeable. Finally, the third section explores a more pluralist alternative in which the nation-state is enmeshed with a range of other entities and argues that this final move towards legal pluralism opens up the greatest possibilities for justice.

A. *The Enclosed United States*



181. Although these kinds of questions are explored in various forms in other interdisciplinary international law analyses, those discussions tend to draw from political science and sociology. *See, e.g.*, OONA ANNE HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS (2005); Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 DUKE L.J. 983 (2005); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 CHI. L. REV. 469 (2005). This Article focuses on what the geographic perspective can bring, and a full integration of geography with these other interdisciplinary approaches is beyond the scope of this paper.

182. *See* Osofsky, *Climate Change Litigation as Pluralist Legal Dialogue*, *supra* note 105; Hari M. Osofsky, *The Geography of Climate Change Litigation Part II: Narratives of* Massachusetts v. EPA, 8 CHI. J. INT'L L. 573 (2008).

In the first variation, the vectors of place, space and time reveal an enclosed nation-state empowered to mete out its version of justice upon Padilla and the Danns. Their fate rests upon determinations at a national level that they have limited ability to influence. Although other seats of authority—whether tribes or supranational entities—formalistically have power to dialogue with the nation-state, the United States' responses make clear that it views itself as controlling the terms of the processes confining Padilla and the Danns.

This enclosed model focuses on the United States as constituted through and governed by the Constitution and the laws that flow from it. To understand the legal space occupied by the United States, one can examine those documents and determine how they distribute decision-making authority. A significant scholarly literature on federalism grapples with these kinds of questions.[183] In the context of these two cases, an extensive and controversial U.S. constitutional jurisprudence exists on takings generally,[184] expropriation of Native American land,[185] the require-

183. Federalism is such a consistent topic in the legal and broader academic literature that it is impossible to capture even the scholarship of the last couple years in a brief footnote. An in-depth engagement of federalism is beyond the scope of this paper. For examples of some interesting recent analyses, see GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR RIGHTS IN POST-CIVIL WAR AMERICA (2006); KIMBERLY S. JOHNSON, GOVERNING THE AMERICAN STATE: CONGRESS AND THE NEW FEDERALISM 1877-1929 (2006); Gary Marks & Liesbet Hooghe, *Contrasting Visions of Multi-level Governance*, *in* MULTI-LEVEL GOVERNANCE 15 (Ian Bache & Matthew Flinders eds., 2004); RUTHERFORD H. PLATT, LAND-USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY (2004); EDWARD PURCELL, ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE (forthcoming 2008); ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: HOW A FEDERAL SYSTEM PROTECTS FUNDAMENTAL RIGHTS (forthcoming); THE DYNAMICS OF FEDERALISM IN NATIONAL AND SUPRANATIONAL POLITICAL SYSTEMS (Michael A. Pagano & Robert Leonardo eds., 2007); Robert B. Ahdieh, *In Praise of Mixed Governance: Federalization, Nationalization, and the Sarbanes-Oxley Act*, 53 BUFF. L. REV. 721 (2005); *Federalism Past, Federalism Future: A Constitutional Law Symposium*, 21 ST. JOHNS J. LEGAL COMMENT. 447 (2007); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007); Dennis R. Judd, *The Case of the Missing Scales: A Commentary on Cox*, 17 POL. GEOGRAPHY 29, 30-32 (1998); Alexandra B. Klass, *Common Law and Federalism in the Age of Regulatory Statute*, 92 IOWA L. REV. 245 (2007); *Modern Federalism Issues and American Business: Articles and Essays*, 41 WAKE FOREST L. REV. 697 (2006); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005); Editors' Foreword, *Symposium: A New Constitutional Order?*, 75 FORDHAM L. REV. 471 (2006); *see also* MICHAEL BURGESS, COMPARATIVE FEDERALISM (forthcoming 2008); J. ISAWA ELAIGWU, THE POLITICS OF FEDERALISM IN NIGERIA (2007).

184. For a discussion of that jurisprudence, see *supra* note 21; *see also* Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1 (2000).

185. For analyses of Supreme Court Indian Law jurisprudence, see FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW (2005 ed.); Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405 (2003).

ments of criminal due process[186] and, increasingly, the category of "enemy combatant."[187]

The outcomes of the two cases can be explained through a narrative that envisions an impenetrable nation-state. If the United States was more permeable, one might expect that the Danns had a better chance than Padilla did of ultimately escaping into another time-space because they sought out entities at supranational levels, the Inter-American Commission on Human Rights and the Committee on the Elimination of Racial Discrimination. In contrast, Padilla's case, in a formal sense, took place entirely within the United States legal system and so he had less external protection from the federal government.[188]

At this point in time, however, Padilla arguably is obtaining more of the protections of the legal system than the Danns are,[189] though fairness concerns stemming from his "enemy combatant" detention infuse his recent conviction and sentencing. Currently, he is categorized as a convicted criminal serving his sentence rather than as an "enemy combatant" and, through such a status, receives the panoply of rights articulated through the United States Constitution, statutes and common law.[190] In contrast, Carrie Dann, since her sister Mary's death, has continued to battle the U.S. government for her land with no change in its recognition of her status. Padilla's "success" in escaping, however, as articulated above has come through an arbitrary re-determination of his status by the federal government. As a formal matter, the U.S. government is choosing when people are moved through wormholes.

Even within the confines of the United States, though, one can focus on strands of the narrative that contain the possibility of greater justice. As a starting point, the enclosed nation-state is not a monolithic entity speaking with one voice. Rather, the national-level perspective is being shaped through an intra-governmental dialogue; the executive, legislative and judicial branches have complementary and conflicting narratives about what justice requires, as evidenced by the differing outcomes of the efforts by petitioners to move into alternative legal spaces. This intersection creates many possible avenues for formal legal change.

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186. For an exploration of some of the core themes in the criminal due process literature, see *supra* notes 8 & 11.

187. For a discussion of the enemy combatant jurisprudence, see *supra* note 106 and accompanying text.

188. *See supra* note 122.

189. For a discussion of dynamics between national courts and international tribunals, see Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004).

190. *See* Verdict, United States v. Padilla, Case No. 04-60001, *available at* http://news.findlaw.com/hdocs/docs/padilla/uspad81707juryverdict.html; sources *supra* note 115.

Most fundamentally, adult citizens in the United States generally have the right to vote at multiple levels of government.[191] With the 2008 Presidential and Congressional elections, as well as the reconfiguration of Congress through the 2006 mid-term elections, come possibilities to change the decisionmakers in two branches of government directly and the third indirectly. One does not even need to look beyond the case examples for reinforcement that who occupies executive and legislative positions and the choices that they make have a major impact on the contours of wormholes. The *Dann* case came close to settling with the Department of the Interior before the Department of Justice decided to seek Supreme Court review,[192] and the Padilla case forms part of the Bush Administration's approach to its War on Terror.[193]

Moreover, conflicting decisions within a branch or among branches may enhance or undermine prospects for justice. Both cases rely upon a mix of Executive Branch decisions, statutes and judicial precedent. As a result, any one of those can be used as a lever for bringing more protection against justice wormholes. Despite all that has unfolded in the *Dann* case, for example, either Congress or the Executive Branch could still give them their land back. Similarly, an agency within the Executive Branch decided to no longer designate Padilla as an enemy combatant, and Congress could amend the statutes at issue in the case.

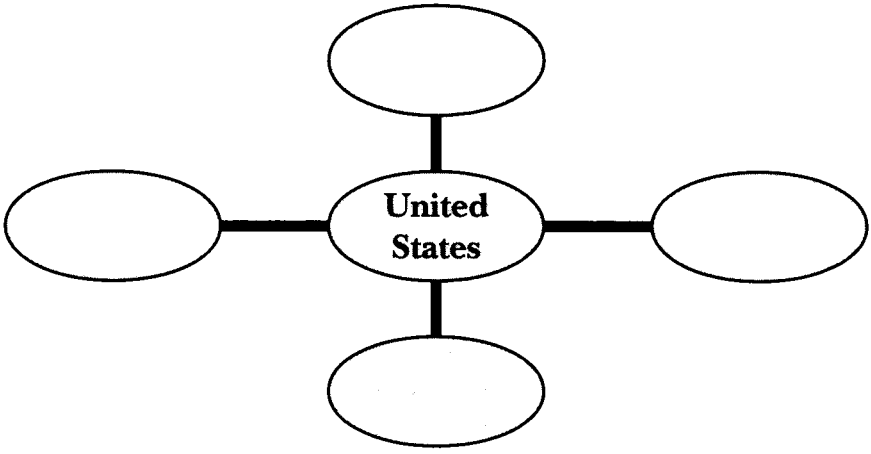
Remapping wormholes in this enclosed model thus requires determining the points of leverage within the structure of the nation-state and strategically engaging them. The possibilities for justice rest upon finding places within the different branches of government where people are amenable to alternative paradigms that change the structure of the big picture.

191. For a discussion of current issues surrounding legal protection of voting rights, see Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708 (2006); Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L. J. 471 (2006).

192. *See* O'Connell, *supra* note 28, at 787-91.

193. *See* Comey, *supra* note 116.

B. *The Permeable United States*



The discussion of strategic advocacy at the end of the preceding Section suggests a core difficulty with the enclosed model of the United States. The federal government does not actually exist in total isolation. As a starting point, the government is an ever-evolving entity because "it" is composed of many individuals. Those individuals shape both the space that it occupies and the scale at which it operates.

Geographer Julie Cidell has explored the many ways in which individuals help to scale institutions. She notes:

> In the literature on the politics of scale, the individual has largely been treated as a separate scale: the site of multiple and conflicting identities, a locus of struggle for political power and control, or an entry point into the sphere of social reproduction. However, jurisdictions and organizations at higher scales are themselves composed of individuals, and therefore consideration needs to be made of the role that individuals play within the politics of scale . . . . In multi-scalar conflicts . . . individuals *as* scales are not politically powerful . . . . Because individuals are themselves the sites of multiple scales, they can be torn between those scalar identities, sometimes expressed as keeping the professional separate from the personal . . . . Finally, there is the question of individuals *within* scales. The conflation of the identities of individuals with the identities of their jurisdiction is a common practice.[194]

Through the individuals that comprise it, the United States government in these cases has "multiple and conflicting identities." As people move in

194. Julie Cidell, *The Place of Individuals in the Politics of Scale*, 38 AREA 196, 202 (2006). As noted previously, related issues have been explored in other disciplines, but not through the particular lens that geography brings. *See* Brenner, *supra* note 177.

and out of government service and evolve over time, both the wormholes and the possibilities for addressing them shift.

Beyond this porousness built into the government's composition, the "United States" is constantly interacting with a range of other entities. Formal and informal interactions help to shape the decisions that are made. Judith Resnik has explained that the federalist structure actually facilitates a range of interconnections between governmental and nongovernmental entities at different levels.[195] These interactions allow rights to permeate the United States legal system even as debates rage over the extent to which its courts should consider foreign and international sources.[196]

In situations like the *Dann* and *Padilla* cases in which the United States government asserts its power to create wormholes, the possibilities for formal relief often seem limited. A permeable model of the United States opens the door to advocacy strategies that can build upon efforts to deconstruct the federal government to find points of leverage. Such strategies are critical when the formal national legal system asserts itself as an enclosed space.

Both the internal and external permeability of the United States create opportunities for remapping wormholes. First, the permeable model allows for a thicker explanation of those points of leverage by recognizing the individuals that comprise them. Accomplishing policy change comes at the nexus of recognizing the governmental interests at stake and the individuals responsible for them. Even such an identification process may not lead to justice, however, if a key individual makes a decision that undermines advocacy efforts. For example, at a crucial moment in the *Dann* case, in which they were negotiating with representatives from the Department of Interior, their attorney, John O'Connell, attempted unsuccessfully to persuade the Solicitor General not to seek Supreme Court review.[197] That certiorari petition ended up disrupting the negotiations and the Court completed the construction of the wormhole and the troubling time-space at the end of it.[198]

Second, this model explains more clearly the effectiveness of informal advocacy strategies on behalf of either side upon the formal legal process. For example, when the United States government officials held a press conference to announce their allegations about Padilla as the Supreme Court was deliberating, that interaction with the media may have influenced the formal legal process.[199] Similarly, although the United States

195. *See* Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006).

196. *See, e.g., Agora: The United States Constitution and International Law*, 98 AM. J. INT'L L. 42 (2004) (debating the appropriateness of international law being used in constitutional interpretation); Austen L. Parrish, *A Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637 (2007).

197. *See* O'Connell, *supra* note 28, at 787-91.

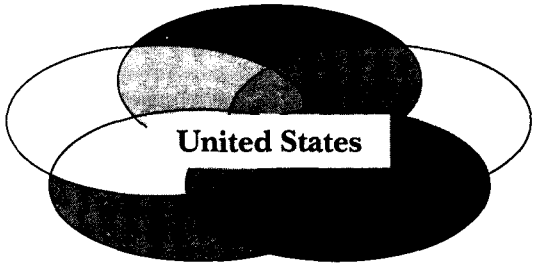
198. *See id.*

199. *See* Comey, *supra* note 116.

has formally refused to change its behavior in response to the Danns' supranational petitions, those filings have helped to draw public attention to the case, which may ultimately influence the behavior of the government.[200]

The permeable model thus represents an intermediate step towards pluralism because it treats the United States as a distinct space, but finds ways of penetrating it. This model thickens the narrative of what the United States is and how it interacts with individuals and entities to include more than just the formal story. In so doing, this approach reveals many holes in the seemingly impenetrable nation-state which are missed in the enclosed model.

C. *The Enmeshed United States*



The permeable model, which provides a second variation of a narrative of the United States' role in these cases, raises additional questions that lead to the third, enmeshed model. Namely, if the dynamics among the actors in these cases actually involve interwoven formal and informal interactions, does the permeable model go far enough? Is it accurate to think of the nation-state as a central entity with other actors penetrating it, or is the United States so deeply engaged with a range of actors that it becomes only one dancer in an ensemble performance? A rich literature in numerous disciplines provides the basis for such a model of the nation-state completely enmeshed with the other actors. This section will meld two of these theoretical approaches, geographer Kevin Cox's work on scale and networks and legal pluralism's effort to engage formal and informal hybridity.

Cox argues that scale can be more aptly described by thinking about networks than through the traditional "areal" approach, which focuses on specific territory like the United States. He explains:

> Networks signify unevenness in the penetration of areal forms. They are also rarely entirely contained by areal forms; boundaries tend to be porous. The territorial reach of state agencies is

200. *See* Osofsky, *The Inuit Petition as a Bridge?*, *supra* note 105; Sheila Watt-Cloutier, Chair, Inuit Circumpolar Conference, Presentation at *Eleventh Conference of Parties to the UN Framework Convention on Climate Change Montreal* (Dec. 7, 2005), *available at* http://www.inuitcircumpolar.com/index.php?ID=318&Lang=En.

> imperfect. Even in the case of the most totalitarian of states, there are always spaces of resistance. The same applies to other agents with territorially defined powers like the utilities, political parties and labor unions. To be sure, they all enjoy power, in the sense of rights, with respect to particular bounded areas or enclosures, but it is a *formal* power which is affected in its actual application by contingent conditions. Conversely, agents, in the associations that they can form and indeed do form, are by no means limited by particular enclosures. Local government policies can be appealed to higher levels of authority. Networks of association are created across national boundaries, as in the fight against apartheid.[201]

Seen in these terms, the cases involve a constant push and pull between formal and informal associational networks. For instance, the appeal to international tribunals in the *Dann* case can be seen as an attempt to "scale up" and involve a network of actors at a larger scale into the dynamics of the case.[202]

In such a model, questions about the relationship between formal law and informal mechanisms emerge. Cox's networks flow between the formal and informal and acknowledge power throughout, a far cry from the enclosed model with which this Part began. The rich literature in legal pluralism may help to explain these dynamics further in a legal context. This scholarship, which originated in and often draws from anthropology, has long explored a vision of law that encompasses multiple normative communities—formal and informal—inhabiting shared social space. Although legal pluralist analyses have varied significantly from their origins in studying colonial societies to the present, they provide a more holistic version of legal decisionmaking that is less focused on what courts and legislatures mandate.[203]

Most relevant to conceptions of the nation-state, an emerging analysis of what is termed "global legal pluralism" describes the way in which state and nonstate actors interact at a range of scales to create simultaneous

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201. Kevin R. Cox, *Spaces of Dependence, Spaces of Engagement and the Politics of Scale, Or: Looking for Local Politics*, 17 POL. GEOGRAPHY 1 (1998).

202. For a broader discussion of efforts to advocate for indigenous peoples' rights under international law, see ANAYA, *supra* note 44.

203. The legal pluralist literature, for example, engages the importance of addressing the multiple normative communities—formal and informal—that share social spaces. *See* Robert M. Cover, *The Supreme Court 1982 Term Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Ambreena Manji, *'Like a Mask Dancing': Law and Colonialism in Chinua Achebe's Arrow of God*, 27 J. LAW & SOC. 626 (2000); Emmanuel Melissaris, *The More the Merrier? A New Take on Legal Pluralism*, 13 SOC. & L. STUDIES 57 (2004); Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869 (1988); Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FLA. ST. U. L. REV. 189 (2001).

binding outcomes.[204] This scholarship owes an intellectual debt to, even as it sometimes moves away from, the New Haven School of international law. That school, which originated from collaboration between Harold Lasswell and Myres McDougal, argues that law is "a process of authoritative decision by which members of a community clarify and secure their common interests."[205] It claims that "humankind today lives in a whole hierarchy of interpenetrating communities, from the local to the global,"[206] and that authoritative decisionmaking grounded in effective power occurs in constitutive arenas that bring together a range of actors from those different communities.[207]

Most leading accounts of how the nation-state should be regarded in our globalizing world are far more pluralist than the formal Westphalian model in which consent between sovereign and equal nation-states undergirds an international legal system centered on them.[208] But the further pluralist step of decentering nation-states leaves considerable ambiguity about how they fit into transnational governance. Consider, for example, this description by McDougal and two other leading New Haven School proponents, W. Michael Reisman and Andrew Willard:

> Since the emergence of nation states in the wake of feudalism and the vanished Roman Empire of the West, the politics of Western Europe have been dominated by the conflicts and accommodations of the nation-state system . . . . With the rapid fragmentation of bodies politic that has taken place since World War II, the nation state, frequently with a scanty resource base, often more closely resembles the land-poor city state of an earlier epoch than a large-scale national unit. Nonetheless, the nation state has come to be viewed as the dominant category of participation in the world community.[209]

Whether or not one moves as far along the pluralist spectrum as the New Haven School and its progeny, the formal legal understanding of the nation-state must somehow be reconciled with the range of thicker descriptions of its role.

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204. *See* Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

205. HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY xxi (1992).

206. *Id.*

207. *Id.* at 425-34.

208. The term Westphalian originated from the treaties underlying the Peace of Westphalia. *See supra* note 164; *see also* Michael J. Kelly, *Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver," Revolutionary International Legal Theory or Return to Rule by the Great Powers*, 10 UCLA J. INT'L L. 361 (2005); Osofsky, *Climate Change Litigation as Pluralist Legal Dialogue*, *supra* note 105.

209. Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 807, 819-20 (1988).

Scholarship by Paul Berman, Mark Drumbl, Harold Hongju Koh, Janet Koven Levit, Sally Engle Merry, Balakrishnan Rajagopal, Annelise Riles, Anne-Marie Slaughter and many other commentators represent a spectrum of perspectives on what such an enmeshed approach might look like. At the end closest to the permeable model, and arguably better categorized as falling under it, Koh's transnational legal process analyzes norm internalization among a multiplicity of actors across borders.[210] Slaughter takes a further step towards pluralism by positing a new world order in which the nation-state takes part in horizontal, vertical and intergovernmental networks.[211]

At the pluralist end of the spectrum in which enmeshment is more complete, a multiplicity of conceptions also prevails. Berman argues for workable hybrid legal structures as the best way of addressing the coexistence of multiple normative communities.[212] Drumbl proposes a cosmopolitan pluralist reform of international criminal law that recognizes horizontal and vertical dimensions of authority and obligation and, in so doing, develops an approach that would enhance synergy between procedural and substantive aspects of international criminal justice.[213] Levit describes what she terms bottom-up lawmaking processes in which elite private actors create controlling rules that later become incorporated into formal law.[214] Merry explores a new legal realism grounded in "a circulation of institutional prototypes, social movements and reform ideas from one local space to another in the constitution of various forms of modernity."[215] Rajagopal analyzes the role of formal legal mechanisms in situations of hybridity and the possibilities and constraints of using them to overcome oppression.[216] Riles considers the possibilities for turning informational and institutional networks "inside out."[217]

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210. Harold Hongju Koh, *Jefferson Memorial Lecture: Transnational Legal Process After September 11th*, 22 BERKELEY J. INT'L L. 337, 339-44 (2004); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996). I have termed Koh's approach "modified Westphalian" in other scholarly contexts, as distinguished from pluralist approaches. *See* Osofsky, *The Geography of Climate Change Litigation Part II*, *supra* note 182.

211. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 131-215 (2004). I have elsewhere described Slaughter as lying between modified Westphalian and pluralist approaches. *See* Osofsky, *The Geography of Climate Change Litigation Part II*, *supra* note 182.

212. *See* Berman, *supra* note 204.

213. *See* MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 181-205 (2007).

214. *See* Janet Koven Levit, *A Bottom-Up Approach to International Law Making: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125 (2005).

215. Sally Engle Merry, *New Legal Realism and the Ethnography of Transnational Law*, 31 LAW & SOC. INQUIRY 975, 992 (2006).

216. *See* Balakrishnan Rajagopal, *The Role of Law in Counter-hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India*, 18 LEIDEN J. INT'L L. 18 (2005).

217. ANNELISE RILES, THE NETWORK INSIDE OUT (2001).

What these theories have in common, despite their diversity in ideological perspective and the extent of their embrace of pluralism, is that they provide a way out of these justice wormholes through re-envisioning how the United States fits into governance.[218] The formal enclosed system of the first variation provides a limited set of options for the Danns and Padilla. If the doors are closed in all of the branches of government, no alternatives exist that provide the possibility of justice. But in a more fluid model, in which the United States is continuously interconnected with multiple actors and levels, formal failure might not spell the end.

This enmeshed model provides the basis for a retelling of the story of Padilla's "greater success" used to reinforce the enclosed model at the beginning of this part. If Padilla's transfer into the criminal justice system was a move to avoid Supreme Court review, a possibility raised in Judge Luttig's reaction, a range of formal and informal advocacy efforts likely helped to pressure the U.S. government into its decision that such a move was necessary.[219] Although the permeable model acknowledges the power of these external influences, the enmeshed model takes the further pluralist step of seeing them as completely integrated with the state itself. As a formal matter, the Executive Branch could invoke "enemy combatant" status again with respect to Padilla, but, as a practical matter, it is unlikely to do so. Even the courts most amenable to its arguments are likely not to be receptive, as Judge Luttig made clear, and the public pressure would be enormous.[220] Moreover, as the war in Iraq becomes increasingly unpopular and the Bush Administration is beleaguered in a variety of ways, the Executive Branch may lack the political capital to sustain such pressure.[221]

Such a retelling also provides a glimmer of hope in the *Dann* case. Although the United States has yet to acknowledge that is has handled their case inappropriately (and maybe it never will), the public pressure may ultimately yield more property rights for Carrie Dann and her family. At the very least, the publicity has helped to limit some of the worst violations on Western Shoshone land. For example, a planned test of "Divine

218. For additional examples of scholarship engaging pluralist perspectives, see Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006); Diane Marie Amann, *Abu Graib*, 153 U. PA. L. REV. 2085 (2005); Diane Marie Amann, *Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone*, 29 PEPP. L. REV. 167 (2001); Elena A. Baylis, *Parallel Courts in Post-Conflict Kosovo*, 32 YALE J. INT'L L. 1 (2007); William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963 (2004); Ralf Michaels, *The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209 (2005).

219. *See* Padilla v. Hanft, 432 F.3d 582, 587 (4th Cir. 2005), *cert. denied* 547 U.S. 1062 (2006).

220. *See id.*

221. For polling reports over time on the Iraq war, see http://www.pollingreport.com/iraq.htm. For a discussion of some of the issues facing the Bush Administration, see Dan Balz, *Libby Verdict Deals Blow to Bush Administration*, WASH. POST, Mar. 6, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/03/06/AR2007030600836_pf.html.

Strake," a weapon containing 700 tons of explosives, was canceled in February 2007 after months of public and legal pressure.[222] These moments of "success" do not eliminate the formal wormholes, but they suggest that networks of interconnection may allow for ways around them.[223] Because the nation-state is not simply being penetrated in this model, but rather is constituted through these networks, they can help to reconstruct its spaces.

V. CONCLUDING REFLECTIONS: JUSTICE'S FOUR DEMANDS

The possibilities for justice in these two cases have hinged upon whether the Danns and Padilla could escape the exceptional categories in which they had been placed. Padilla's only hope for a modicum of procedural due process, however tainted, was recategorization from enemy combatant to criminal defendant. Similarly, if the Danns could have moved outside of the Indian Claims Commission framework—in which the reality that the encroachment began with the ICC proceedings could be ignored—the takings jurisprudence, as noted by the Inter-American Commission, might have provided them with some recourse. As a formal matter, even the escape that Padilla managed was not a complete one. Because he was given back due process rights arbitrarily, they could be taken away again.[224] And his sentence reduction barely begins to capture the ordeal that he suffered or the ways in which his previous "enemy combatant" status may have impacted his trial and the jury's verdict.

Moreover, the relevant exceptional categories are not simply within the cases themselves. The particularities of these cases occur against a broader backdrop of United States exceptionalism, in which nation-state representatives either claim that international norms do not apply or morph them into almost unrecognizably weakened forms.[225] The notion that the national government can lock people away and throw away any sort of judicial keys on national security grounds, or that it can determine that land has been taken without engaging the truth of that taking or any public purpose behind it, challenge minimal threshold considerations of justice that undergird both the United States and international legal systems. It is no wonder that my international law students each year become

222. News Release, *Defense Threat Reduction Agency, Cancellation of Proposed Divine Strake Experiment* (Feb. 22, 2007), *available at* http://www.dtra.mil/newsservices/press_releases/display.cfm?pr=divine_strake_cancelled.

223. Extensive literature exists on the role that publicity can play in shaping legal discourse. A full exploration of this discourse is beyond the scope of this Article. For a discussion of the role that the media plays in dispute resolution, for example, see Linda L. Putnam, *The Media as a Stakeholder in Framing Public Conflicts*, 13 DISP. RESOL. MAG. 12 (2007).

224. For the discourse over the implications of this and other "enemy combatant" cases, see *supra* notes 106 & 126.

225. For a discussion of U.S. exceptionalism and *Sanchez-Llamas v. Oregon*, see Margaret E. McGuinness, Sanchez-Llamas, *American Human Rights Exceptionalism and the VCCR Norm Portal*, 11 LEWIS & CLARK L. REV. 47 (2007).

less certain that a norm exists against torture, or that international law imposes meaningful boundaries on the use of force.

This Article argues that an alternative narration of the United States as an enmeshed space opens possibilities internally and externally for addressing these lacunae in our justice system. In particular, such a model allows for a focus on four requirements of justice that have been undermined in these cases. Although a law and geography approach is not required to conceptualize these four requirements—many scholars have traversed similar ground and a rich literature explores justice's contours—its thicker analysis provides a deeper understanding of how basic protections of justice have been eliminated in these cases and what reconstructing them would entail.[226] This approach allows for a version of justice to emerge in each situation that takes spatio-temporal context into account and, in so doing, situates the problem amid complex, multiscalar interactions.

First, the "enclosed United States" has done a remarkably poor job of clarifying the minimum protections for basic civil liberties in these types of situations. Even after O'Connor's opinion in *Hamdi* ostensibly articulated due process protections that would apply to Padilla, he continued to languish in a naval brig in South Carolina.[227] The notion that one can shift from a system of constitutionally guaranteed liberty to nearly unfettered government discretion through executive order smacks of the very abuses that the Constitution was created to avoid.[228] Many have had the courage to take this stance in the post-9-11 environment of fear and their fight, as demonstrated in the Padilla case, is an important part of what pressures the United States government to at least justify its actions. A law and geography analysis of these shifts and of the multiple responses to them helps to reframe dialogues about how minimum protections should vary across socio-legal contexts.

Such an analysis should acknowledge that the post-9-11 environment does not represent an entirely new formulation. The roots of our "liberal democracy" in conquest and the expropriation that continues are not so different from the post-9-11 abuses.[229] Engaging what a liberty baseline should be requires considering inequality built into more than just the War on Terror. The eerie parallels between the *Dann* and *Padilla* cases, despite their very different substantive contexts, reinforces the need to think more broadly about what a just legal system would entail. The kind of interdisciplinary approach modeled in this Article allows for an assessment of the extent to which minimum protections exist at every intersection of place, space and time, and the assumptions about relevant levels of government that accompany those legal constructs.

226. *See supra* note 3.

227. *See supra* notes 131–37 and accompanying text.

228. *See supra* note 106.

229. *See supra* notes 57 & 106.

Second, an important piece of these minimum guarantees for liberty involves consistency. Although Emerson aptly noted that "foolish consistency is the hobgoblin of little minds,"[230] the lack of core consistency in the legal structures and the judicial application of them that these cases highlight is troubling. How can we simultaneously debate the nuances of public use in the post-*Kelo* environment and accept that for certain populations such a requirement is essentially waived? How can Padilla be an "enemy combatant" one day and a criminal defendant the next? If the legal system allows for special categories that treat people as having less liberty, it at the very least needs to make the contours of those categories clear and provide some check that makes sure that those with extraordinary power have "gotten it right" in some meaningful way.

A critical aspect of ensuring that consistency is a deeper analysis of where those contours create risks of wormholes that suddenly transport people into a new legal time-space. For example, property and Indian law treat governmental expropriation differently.[231] An assessment of the appropriateness of that divergence depends upon understanding the socio-legal context through which the doctrinal approaches emerged and continue to develop. The geographic perspective ensures that such an analysis examines spatio-temporal intersections and the presumptions about legal structures—both in terms of space and scale—that accompany them.

Third, those deemed outsiders—whether socially or legally—in this country have repeatedly been treated poorly even when there is no basis for doing so. The ongoing legacies of conquest and slavery just represent two of the most extreme versions of a more general pattern. Especially when a climate of fear prevails, large-scale denials of liberty repeatedly have occurred in this country.[232] The period following the 9-11 attacks was no exception, of course. People who looked too much like "potential terrorists" were beaten or otherwise discriminated against.[233] Men with the wrong last name were brought to Guantanamo.[234] Women with babies who wanted to ride planes were on many occasions made to drink their expressed breast milk in order to have the privilege of passing through airport security.[235]

230. RALPH WALDO EMERSON, *Self-Reliance, in* ESSAYS: FIRST AND SECOND SERIES 29, 35 (1990).

231. *See supra* notes 184–85.

232. *See supra* note 18 and accompanying text.

233. For an analysis of post-9-11 racial profiling, see Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45 (2003); Symposium, *Immigration and Civil Rights After September 11*, 38 U.C. DAVIS L. REV. 599 (2005).

234. *See, e.g.*, Tim Golden, *Voices from Guantánamo: Brash and Befuddled Files Reveal Mixed Portrait of Detainees*, INT'L HERALD TRIB., Mar. 7, 2006, at 2; *see also* Richard Bernstein, *One Muslim's Odyssey to Guantanamo*, N.Y. TIMES, June 2, 2005, *available at* http://www.nytimes.com/2005/06/05/international/europe/05prisoner.html?_r=1&oref=slogin.

235. *Mother Forced to Drink Breast Milk at Security Check*, ABC NEWS ONLINE, Aug. 9, 2002, http://www.abc.net.au/news/newsitems/200208/s643976.htm. Transportation security officials have also forced mothers to discard containers of

But in telling the most egregious post-9-11 stories, like that of Padilla and the even-more procedurally challenged Guantanamo detainees, it is important not to miss the less publicized stories like that of the Danns, which itself has received far more media attention than many of the other daily encroachments on indigenous peoples' rights in this country. The Western Shoshone Defense project, for example, reports regularly on crises facing indigenous peoples which receive little publicity.[236] And there are many "others" who have faced and continue to experience discrimination, both blatant and subtle, on a daily basis. In the not-so-distant past in Los Angeles, for example, Chinatown was razed to make way for Union Station, and the destruction of the the Mexican-American Chavez Ravine neighborhood allowed for the building of Dodger Stadium.[237] The post-Kelo uncertainties about what sort of "public use" the takings jurisprudence requires provides more opportunities for differential treatment unless our legal system is vigilant about problems of equality.[238] This Article argues that these inequities involve specific confluences of place, space and time, and how we conceptualize the construction of governmental spaces impacts the possibilities for change. A law-and-geography approach assists in a much-needed exploration of this nuance.

Fourth, and underlying the previous three requirements, through these case examples, the Article attempts to demonstrate the value of a more complete mapping of justice wormholes that accounts for the multiple narratives that are inevitably involved. Does one tell the story of the *Dann* case as an unfortunate one in which claimants simply came to the justice system too late, or as judicial land theft grounded in centuries of conquest? Is Padilla a very dangerous terrorist that the government needs leeway to interrogate on the basis of national security, or is he a U.S. citizen deserving of the protections that our Constitution affords those accused of even the most terrible crimes?

The crucial point here is not simply that there are widely divergent opinions about how to balance liberty and security or even the basic facts of these situations, but that our legal system needs to embrace a version of justice that allows for these multiple perspectives.[239] In practical terms,

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pumped breast milk. *See, e.g.*, Blythe Bernhard, *Mom's Milk Fuels Fight*, ORANGE COUNTY REGISTER, Feb. 7, 2007.

236. *See* Western Shoshone Defense Project, Alerts, http://www.wsdp.org/alerts.htm (last visited Sept. 28, 2007)

237. *See* Paul Stanton Kibel, *Los Angeles' Cornfield: An Old Blueprint for New Greenspace*, 23 STAN. ENVTL. L.J. 275, 304-07 (2004). I worked on the Chinatown Cornfield case as a Fellow at the Center for Law in the Public Interest from 1999 to 2001.

238. *See supra* notes 20–21 and accompanying text.

239. I have elsewhere, drawing from the work of Edward Soja, *see* EDWARD W. SOJA, THIRDSPACE: JOURNEYS TO LOS ANGELES AND OTHER REAL-AND-IMAGINED PLACES (1996), explored what it might mean to accept multiple narratives simultaneously. *See* Osofsky, *The Geography of Climate Change Litigation Part II*, *supra* note 182.

that means at the very least ensuring that everyone receives minimum liberties protection, as well as consistent treatment that comports with with principles of equality. If justice in our legal system contains a floor, rather than a wormhole, it makes space for differences in perspective, but not at the expense of those who are least powerful. We need to map and remap legal constructions to minimize possibilities for the types of patterns that these cases contain. This Article provides an example of how this type of analysis might assist in addressing justice wormholes and the time-spaces they lead to, but far more exploration of these issues is needed.

Justice wormholes do not have to exist in our legal system. They are constructed. Those possessing formal lawmaking authority have an obligation to eliminate them, while the rest of us—through formal and informal means—have the power to confine them. By acknowledging the pervasiveness of these wormholes across areas of law and engaging their socio-legal context, we open up possibilities for eliminating these spaces in which people are legally, and sometimes all too literally, "torn apart and crushed out of existence."[240]

240. *See* HAWKING, *supra* note 1, at 86.

APPENDIX 1: CHRONOLOGY OF *DANN* PROCEEDINGS

Date	Expropriation Proceedings	Trespass Proceedings	Supranational Petitions
1951	Te-Moak Band includes Dann's land in Indian Claims Commission (ICC) compensation claim.[241]		
1957	ICC holds hearing on title.[242]		
1962	ICC determines that title is extinguished.[243]		
1966	Parties stipulate as to the date of extinction in ICC proceedings.[244]		
1967	Hearings on valuation regarding ICC claim.[245]		
1972	ICC determination of valuation.[246]		
1974	Mary and Carrie Dann attempt to intervene in the pending ICC case to remove their land from consideration.[247]	Mary and Carrie Dann cited for trespassing on the traditional Western Shoshone land that their family has occupied since the 1920s.[248]	
1975	ICC rules their petition untimely.[249]		
1977	ICC announces its final award of $26,145,189.89 in compensation to the Western Shoshone Identifiable Group.[250]		

241. W. Shoshone Legal Def. & Ed. Ass'n v. United States, 531 F.2d 495, 496 (Ct. Cl. 1976).

242. *Id.* at 502.

243. *Id.*; Shoshone Tribe v. United States, 11 Ind. Cl. Comm. 387, 416 (1962), *available at* http://digital.library.okstate.edu/icc/v11/iccv11ap387.pdf.

244. W. Shoshone Identifiable Group v. United States, 29 Ind. Cl. Comm. 5, 7 (1972), *available at* http://digital.library.okstate.edu/icc/v29/iccv29p005.pdf.

245. *Id.* Oral argument regarding valuation was held in 1971. *Id.*

246. *Id.* at 57.

247. United States v. Dann, 572 F.2d 222, 225 (9th Cir. 1978), *rev'd*, 470 U.S. 39 (1985).

248. *Id.* at 223; United States v. Dann, 873 F.2d 1189, 1193 (9th Cir. 1987).

249. W. Shoshone Identifiable Group v. United States, 35 Ind. Cl. Comm. 457, 463 (1975), *available at* http://digital.library.okstate.edu/icc/v35/iccv35p457.pdf.

250. W. Shoshone Identifiable Group v. United States, 40 Ind. Cl. Comm. 318, 318 (1977), *available at* http://digital.library.okstate.edu/icc/v40/iccv40p453.pdf.

Date	Expropriation Proceedings	Trespass Proceedings	Supranational Petitions
1978		Ninth Circuit holds that Danns can assert aboriginal title as a defense because the ICC award is not yet final.[251]	
1979	Court of Claims affirms ICC award and certifies the award for payment.[252]		
1985		U.S. Supreme Court holds that payment of funds into a treasury fund constituted payment, which thereby extinguishes tribal aboriginal title. The Court remands for consideration of individual aboriginal rights.[253]	
1989		Ninth Circuit holds that the Danns have individual aboriginal title to land occupied by them or their linear ancestors prior to 1934.[254]	
1991		Danns withdraw claims to individual aboriginal rights to avoid separation from their tribal claims.[255]	
1992			U.S. Bureau of Land Management (BLM) impounds hundreds of heads of the Danns' livestock.[256]

251. *See Dann*, 572 F.2d at 226-27.

252. Temoak Band of W. Shoshone Indians v. United States, 593 F.2d 994, 996, 1002 (Ct. Cl. 1979).

253. United States v. Dann, 470 U.S. 39, 49–50 (1985).

254. United States v. Dann, 865 F.2d 1528, 1538 (9th Cir. 1989), *amended by*, 873 F.2d 1189 (9th Cir. 1989).

255. PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, Annex II, ¶ 28(b) (April 2007), *available at* http://www.wsdp.org/Annex_II_to_US_Periodic_Report_4-07.pdf.

256. *Id.* ¶ 29.

Date	Expropriation Proceedings	Trespass Proceedings	Supranational Petitions
1993			• Danns petition the Inter-American Commission on Human Rights.[257] • The BLM publishes a notice stating that it intends to impound their livestock.[258] •The Commission issues precautionary measures asking the BLM to stay the impoundment.[259]
2002			• Inter-American Commission makes recommendations in favor of Danns.[260] • U.S. government impounds 225 heads of cattle and auctions them to the highest bidder.[261]
2003			U.S. government rejects the Inter-American Commission's recommendations.[262]
2005			Western Shoshone representatives file petition with Committee for the Elimination of Racial Discrimination (CERD).[263]
2006			CERD determines that United States should stay a variety of plans on Western Shoshone lands.[264]

257. Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶ 2 (2002).

258. *Id.* ¶ 14-15.

259. *Id.* ¶ 179.

260. *Id.*

261. *Id.*

262. Response of the Government of the United States to October 10, 2002, Report No. 53/02 Case No. 11.140 (Mary and Carrie Dann), *available at* http://www.cidh.org/Respuestas/USA.11140.htm.

263. Second Request for Urgent Action under the Early Warning Procedure to the Committee on the Elimination of Racial Discrimination, W. Shoshone People of the Timbisha Shoshone Tribe v. United States (July 29, 2005), *available at* http://www.law.arizona.edu/depts/iplp/advocacy/shoshone/documents/CERD-SecondRequestforUrgentAction.pdf.

264. UNITED NATIONS, COMMITTEE FOR THE ELIMINATION OF RACIAL DISCRIMINATION, 68TH SESS., EARLY WARNING AND URGENT ACTION PROCEDURE DECISION 1 (68), ¶ 10 (Feb. 20–Mar. 10, 2006), *available at* http://ohchr.org/english/bodies/cerd/docs/68decision-USA.pdf.

Date	Expropriation Proceedings	Trespass Proceedings	Supranational Petitions
2007			United States files periodic report to CERD, which states, *inter alia*, that the CERD recommendations "are inconsistent with the status of these lands under U.S. law."[265]
2008			CERD issues concluding observations that reinforce its recommendations and express strong regret at the U.S. failure to follow up on them.[266]

265. PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, ¶¶ 334-49 (Apr. 2007), *available at* http://www.wsdp.org/US_Periodic_Report_4-07.pdf.

266. CERD Concluding Observations, *supra* note 43, ¶ 19.

APPENDIX 2: CHRONOLOGY OF *PADILLA* PROCEEDINGS

Date	"Enemy Combatant" Proceedings	Criminal Proceedings
May 8, 2002		Padilla detained by federal agents on material witness warrant.[267]
June 9, 2002	Padilla designated an "enemy combatant" and transferred to Navy brig in Charlottesville.[268]	
June 11, 2002	Padilla files habeas petition in district court for the Southern District of New York.[269]	
Dec. 4, 2002	Southern District of New York allows habeas petition to proceed but also holds that President may detain U.S. citizens captured in the United States as "enemy combatants."[270]	
Dec. 18, 2003	Second Circuit reverses and holds that President cannot detain Padilla.[271]	
June 28, 2004	U.S. Supreme Court holds that Rumsfeld is not a proper respondent and that New York federal courts lack jurisdiction.[272]	
July 2, 2004	Padilla files a habeas corpus claim in the district court for District of South Carolina.[273]	
Feb. 28, 2005	District court for District of South Carolina holds that Padilla is entitled to a hearing on his "enemy combatant" status and denies inherent Presidential power.[274]	
Apr. 7, 2005	Padilla files petition for certiorari with United States Supreme Court on the grounds of the length of detention and of the full briefing and argument before the Second Circuit.[275]	
June 13, 2005	U.S. Supreme Court denies certiorari.[276]	

267. Rumsfeld v. Padilla, 542 U.S. 426, 430 (2004).

268. *Id.* at 431-32.

269. *Id.* at 432

270. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 610 (S.D.N.Y. 2002), *rev'd sub nom.*, Rumsfeld v. Padilla, 542 U.S. 426 (2004).

271. Padilla v. Rumsfeld, 352 F.3d 695, 724 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004).

272. *Padilla*, 542 U.S. at 441, 447 (2004).

273. Padilla v. Hanft, 389 F. Supp. 2d 678, 679 (D.S.C. 2005), *rev'd*, 423 F.3d 386 (4th Cir. 2005).

274. *Id.* at 691-92.

275. Brief for Petition for Writ of Certiorari Before Judgment, Padilla v. Hanft, 545 U.S. 1123 (2005) (No. 04-1342).

276. Padilla v. Hanft, 545 U.S. 1123 (2005).

Date	"Enemy Combatant" Proceedings	Criminal Proceedings
Sept. 9, 2005	Fourth Circuit reverses, holding that the President has the power to detain Padilla.[277]	
Oct. 25, 2005	Padilla files petition for certiorari with U.S. Supreme Court.[278]	
Nov. 17, 2005	In light of its transfer request, discussed in this Appendix as part of the criminal proceedings, the Justice Department requests that the Fourth Circuit vacate its Oct. 24, 2005 opinion.[279]	Justice Department reports that Padilla has been indicted by grand jury in Miami on terrorism and conspiracy charges, states that this indictment supersedes the "enemy combatant" designation, and requests Padilla's transfer to Florida.[280]
Dec. 21, 2005	Fourth Circuit denies government's motion to vacate opinion.[281]	Fourth Circuit denies government's transfer motion.[282]
Jan. 4, 2006		U.S. Supreme Court authorizes Padilla's transfer.[283]
Apr. 3, 2006	Supreme Court denies certiorari on habeas petition on grounds of mootness.[284]	
Aug. 18, 2006		Southern District of Florida (S.D. Fla.) dismisses Count One on double jeopardy grounds.[285]
Nov. 17, 2006		S.D. Fla. denies Padilla's motion to suppress pre-arrest statements at airport.
Jan. 30, 2007		Eleventh Circuit reinstates Count One.[286]
Apr. 9, 2007		S.D. Fla. denies Padilla's motion to dismiss for outrageous government conduct.[287]
May 14, 2007		Padilla's criminal trial begins.[288]

277. Padilla v. Hanft, 423 F.3d 386, 397 (4th Cir. 2005).

278. Brief of Petitioner for Writ of Certiorari, Padilla v. Hanft, 547 U.S. 1062 (2005) (No. 05-533).

279. Padilla v. Hanft, 432 F.3d 582, 584 (4th Cir. 2005); United States v. Padilla, No. 04-60001-CR, 2007 WL 1079090, at *1 (S.D. Fla. Apr. 9, 2007).

280. *Padilla v. Hanft*, 432 F.3d at 583.

281. *Id.* at 587.

282. *Id.*

283. Hanft v. Padilla, 546 U.S. 1084 (2006).

284. Padilla v. Hanft, 547 U.S. 1062 (2006).

285. United States v. Padilla, No. 04-CR-60001, 2006 WL 2415946, at *4 (S.D. Fla. Aug. 18, 2006), *rev'd*, United States v. Hassoun, 476 F.3d 1181 (11th Cir. 2007).

286. United States v. Hassoun, 476 F.3d 1181, 1188-89 (11th Cir. 2007).

287. United States v. Padilla, No. 04-60001-CR, 2007 WL 1079090, at *1 (S.D. Fla. Apr. 9, 2007).

288. *See* Abby Goodnough, *After 5 Years, Padilla Goes on Trial in Terror Case*, N.Y. TIMES, May 14, 2007, at A14.

Date	"Enemy Combatant" Proceedings	Criminal Proceedings
Aug. 16, 2007		Padilla and his co-defendants convicted on all counts by a unanimous jury.[289]
Jan. 22, 2008		Padilla sentenced to a term of 208 months.[290]

289. Verdict, United States v. Padilla, No. 04-60001, 2007 WL 2349148 (S.D. Fla. Aug. 16, 2007).

290. *See* Department of Justice, Press Release, *supra* note 110.